92-512

No. 92-

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

UNITED STATES OF AMERICA, ex. rel.,
and
KEVIN M. ASLANIAN; RICHARD L'ITALIEN; GEORGIA UREMOVIC; and CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS,

Petitioners,

v.

GEORGE DEUKMEJIAN, Governor, State of California, et. al.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Additional Listing of Respondents:

LINDA McMAHON, Director, California State Department of Social Services; **STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES;** SACRAMENTO COUNTY, BOARD OF SUPERVISORS; DENNIS HART, Director, Sacramento County Department of Social Services; **SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES,**

Respondents.

I

QUESTIONS PRESENTED FOR REVIEW

I. Did the Courts in interpreting a statute where there exists conflict among the federal circuits err in interpreting this Congressional Act (31 USC §3730) contrary to the announced legislative intent by ruling these Petitioners-Relators were not proper Qui Tam Plaintiffs as their cause was **"based upon" "publicly disclosed"** information?

II. Was there improper denial of reconsideration and the right of these original sources to amend their Complaint to plead proper pre-filing notification to the United States to satisfy statutory jurisdictional requirements of 31 U.S.C. §3730 (e)(4)(B) as allowed by 28 U.S.C. 1653 and FRCP Rule 12 (b) and Rule 15 (a) and existing case law of this Court?

III. On this important statutory interpretation of 31 U.S.C. §3730, was there sufficient absence of notice and opportunity to be heard in the trial Court so as to constitute a denial of due process under the Vth Amendment?

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II

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. Petitioners on behalf of The United States of America, KEVIN ASLANIAN, RICHARD L'ITALIEN and COALITION OF CALIFORNIA WELFARE RIGHTS ORGANIZATIONS, represented by Grace A. Galligher, 1901 Alhambra Boulevard, 2nd Floor, Sacramento, CA 95816.

2. Petitioner on behalf of the United States of America, GEORGIA UREMOVIC, represented by Peter H. Smurr, 5738 Marconi Avenue, P.O. Box 505, Carmichael, CA 95608.

3. Respondents GEORGE DEUKMEJIAN as Governor of the State of California; LINDA McMAHON, as Director, California State Department of Social Services; CALIFORNIA STATE DEPARTMENT OF SOCIAL SERVICES, represented by Daniel E. Lungren, Attorney General of State of California, 1515 K Street, Sacramento, CA 95814.

4. Respondents SACRAMENTO COUNTY BOARD OF

SUPERVISORS; DENNIS HART as Director of Sacramento County Department of Social Services; and SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES; represented by Lee Elam, County Counsel of Sacramento, 700 H Street, Suite 2650, Sacramento, CA 95814.

III

REFERENCE TO REPORT, DECISION OR OPINION

The opinion of the Ninth Circuit Court of Appeals was filed on 17 June 1992 and is unreported and is printed in the Appendix filed concurrently herein.

Eastern District orders of 1 November 1990 granting Motion to Dismiss and Order of 7 March 1991 denying Reconsideration.

IV

GROUND FOR JURISDICTION OF THIS COURT

This is a case under 28 U.S.C. §1254 (1) which allows a Writ of Certiorari to be presented to the Supreme Court for its review

after judgment rendered in the Circuit Court of Appeals.

It is further brought under The False Claims Act, 31 U.S.C., §3729, et seq., which provides federal jurisdiction to the Federal Courts.

V.

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED.

Vth Amendment to the Constitution
28 U.S.C. §1653
31 U.S.C. §3729
31 U.S.C. §3730
42 U.S.C. §670
42 U.S.C. §671
45 C.F.R. §205.10
45 C.F.R. §1355
45 C.F.R. §1356
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Rule 12 (b)
Rule 12 (c)
Rule 15
Rule 56
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Rule 302

Rule 501

Civil Code of State of California

§1798.1

Government Code of State of California,

§6250

§6252

Welfare and Institutions Code of State of California

§827

§10850

§10964

VI.

CONCISE STATEMENT OF THE CASE

Petitioners, on behalf of the United States (Relators below) brought a Qui Tam action under the False Claims statute alleging that Respondents State of California and the County of Sacramento, presented false claims for payment to the United States of America by requesting payment for providing required due process "notices" and "fair hearings" which were not in fact provided, and were known not to have been provided. (42 U.S.C. § 670, et

seq.) This lack of "due process" led to many hardships and one known death to recipients of federal child welfare services and the improper receipt of approximately $68,000,000.00 of federal money by Defendants.

Petitioners voluntarily interviewed and officially represented recipients as "authorized representatives" under 45 C.F.R. §205.10.

Petitioners thus became aware that virtually every person they represented had not received notice of their "due process" rights of "notices of action" and/or "administrative fair hearings" contrary to statutory provisions.

Petitioners, after discussing the matter with federal Health and Human Services representatives prepared and filed their Complaint, sent it to the Department of Justice together with supporting information. The Complaint was lodged and sealed in September 1988. After the United States filed

its "Declination of Appearance" in December 1988, the Complaint was served on all parties.

Defendants, during the time that discovery was still open, and no trial date set, filed a multi-faceted dismissal motion.[1] Such motion was granted by the District Court for lack of subject matter jurisdiction[2] by verbal pronouncement in Court which afterwards allowed a ten (10) minute argument to Plaintiffs counsel.

VII

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit affirmed the Decision of District Court for the Eastern District of California by holding that Plaintiffs were "original sources" but otherwise affirming the District Court's Order

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[1]FRCP 12(b)(1), (b)(2) or in the alternative FRCP 12(c) or under FRCP 56.

[2] (Failure to meet statutory requirements of 31 U.S.C. §3730(e)(4)

dismissing the Complaint for lack of subject matter jurisdiction, denial of Amended Complaint and denial of Reconsideration.

VIII

ARGUMENT

ARGUMENT NO. I

APPELLANT COURT ERRED IN RULING THAT PETITIONERS WERE NOT PROPER "QUI TAM" PLAINTIFFS BECAUSE THEIR ACTION WAS BASED UPON INFORMATION PUBLICLY DISCLOSED.

The legislative intent, purpose and spirit of 31 U.S.C § 3730(e)(4)(A)[3] demonstrate that this subsection does not bar subject matter jurisdiction in this case. Accepting the Ninth Circuit's holding that Relators are "original sources", are Relators properly excluded as "Qui Tam Plaintiffs" representing the Federal Government solely because some of their information was disclosed to the public?

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[3]31 U.S.C. §3730(e)(4)(A) hereinafter referred to as §(e)(4)(A)

This exclusionary subsection as interpreted in this case potentially destroys one of our most essential federal statutes. While §3730(e)(4)(A) has never been interpreted by the Supreme Court of the United States, it is currently subject to conflicting decisions in at least four Circuits and three district courts.

The legislative intent is most cogently put by the Congressional record. The 1986 Amendments were designed to encourage more private enforcement suits. S. Rep. 345 at 23-24.

The 1982 False Claim Statute retained the bar to subject matter jurisdiction whenever Relators disclosed information relating to false claims to the Federal Government. The 1986 Amendment tried to prevent this from happening. U.S.A. ex rel. LaValley v. First National Bank of Boston, 707 F.Supp. 1351, 1354 (D.C.Mass 1988)

This Court has overwhelmingly held that a

legislative act is to be interpreted according to the intention of the legislature. Priestman v. United States, 4 U.S. (4 Dall) 28,32, and that it is the duty of the Court to discover the intention of the legislature and to respect that intention. Pennington v. Coxe, 6 U.S. (2 Cranch) 33,53. Further, the provision of a statute ought not to be so construed as to defeat its object unless the language be such as absolutely to require such construction. Scott v. Ben, 10 U.S.(6 Cranch) 3 (1810).

A. DISCUSSION OF "BASED UPON".

The District Court and the Ninth Circuit Court of Appeals held that Relators are within the exclusion of §(e)(4)(A). The District Court determined that Relators Complaint was based on what appeared to be public documents. The District Court further found that Relators (1) were not original sources, and (2) did not voluntarily provide the information to the Government before filing the complaint.

The Ninth Circuit Court affirmed the District Court's finding that the information underlying Plaintiffs' claims was publicly disclosed by Plaintiffs prior to the filing of the action. Paradoxically, the Appellate Court did find that Relators **were "original sources"** since they did possess direct and independent knowledge. Both Courts held that Plaintiffs failed to voluntarily provide the information to the Government before filing the complaint as required by 31 U.S.C.§3730 (e)(4)(B).

31 U.S.C. § 3730(e)(4)(A) bars federal court jurisdiction in certain cases. It states:

> "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bring the action is an original source of the information."

Contrary to the holdings of both the District Court and Court of Appeal this language does not bar complaints where incidental public disclosures were made but were not the "basis" or "source" of the false claims complaint. The facts contained in this Complaint are not "based upon" any "public disclosure" since Relators possessed independent knowledge of the facts and allegations outside of any "public disclosures."

The term "based upon" denotes a point of origin from which a chain of events unwinds. Here, the point of origin was the personal research and investigation of each Relator. **The Complaint that relators filed was based on direct and independent research and investigations which each Relator, either separately or together conducted over a period of four years.** From that origin, relators (1) requested administrative "fair" hearings which caused decisions to be issued, (2) filed the

Shea complaint, and (3) had a newspaper article published. The Courts below held these actions excluded Plaintiffs.

Several federal courts have defined the term "based on" so as to require this direct and causal nexus between the act and the complaint. Velidor v. L.P.G.Benghazi, 653 F2d 812, 820 (3d Cir., 1981).

It is illogical for the District Court to determine that the nexus and the source of this false claims complaint was information which Relators caused to be published. The published information cannot be said to be the foundation of the Complaint; rather, the published information itself is an end product of the same investigation and research efforts by the Relators which resulted in the Relators Complaint.

B. DISCUSSION OF "PUBLIC DISCLOSURE".

Publication of general, non specific information is outside the exclusionary bar of §(e)(4)(A) when it does not necessarily lead

to the discovery of specific individual fraud which is the target of the qui tam complaint. U.S.A ex rel Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Insurance Co., 721 F.Supp. 1247, 1258 (S.D. Fla. 1989). Two Circuits, First and Eleventh, apparently would not have applied the §(e)(4)(A) exclusion to Petitioners' case herein. The Court of Appeals in at least four circuits and three district courts have considered what constitutes "public disclosure" for purposes of the jurisdictional bar with contradictory results. The First Circuit generally considered what §(e)(4)(A) barred in USA ex rel LeBlanc v. Raytheon Co. Inc. 913 F2d 17 (1st Cir. 1990). The issue facing this court was whether there is a jurisdictional bar whenever a government employee is the Relator. It does not deny jurisdiction over actions based on disclosures other than those specified in the statute. LeBlanc. Id. at 20.

The Ninth Circuit Court held §(e)(4)(A) "remarkably explicit" and a qui tam action is barred only if based upon information disclosed in

> "... a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation..." USA ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991).

The Eleventh Circuit stated the list of methods of "public disclosure" is specific, Complete and not examples of the types of "public disclosures" to which the jurisdictional bar would apply. U.S. ex. rel. Williams v. NEC Corp. 931 F.2d 1493,1499 (11th Cir., 1991).

The Georgia District Court in U.S.A. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of GA., 755 F.Supp. 1040 (DC SD GA, 1990), having virtually the same facts before it as the Prudential Court, entered an entirely different decision. (Id. at 1048.) The Blue Cross District Court

concluded that the language following the term "public disclosure" limits that phrase; narrowing the jurisdictional exclusion.

The District Court in U.S.A. ex rel. LaValley v. First National Bank of Boston, 707 F.Supp. 1351 (D.C.Mass, 1988) noted that there is subject matter jurisdiction when the sources of the information were obtained **independently from** many investigations by each Relator who initiated a False Claims action.

USA ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins., 944 F.2d 1149 (3rd Cir. 1991). The Court looked beyond the purported design of the statute as a whole and the Court interpreted the public disclosures broadly to include allegations and information disclosed in connection with any civil, criminal, or administrative litigation. Id. at 1155, 1156.

Reviewing each of the above cited cases, no Court has held, as did the District Court and the Ninth Circuit Court of Appeals, that

so little public disclosure caused the activation of the exclusionary bar of §3730(e)(4)(A) as did the case herein.

ARGUMENT NO. II.

THERE WAS IMPROPER DENIAL OF THE RIGHT OF THESE ORIGINAL SOURCES TO AMEND THEIR COMPLAINT TO PLEAD PROPER PRE-FILING NOTIFICATION TO THE UNITED STATES TO SATISFY STATUTORY JURISDICTIONAL REQUIREMENTS.

On 14 September 1990 the issue under 31 USC §3730(e)(4)(B)[4] requiring original sources to provide pre-filing communication of the facts of the case to the Federal Government was stated in the Federal Amicus Brief.

At this time, Relators Opposition to Motion to Dismiss together with their Affidavits and documents had been previously filed by 27 July 1990.[5] Prior to the 9 July 1990 Motion to Dismiss, Defendants had

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[4]31 USC §3730(e)(4)(B) is referred to hereinafter as §(e)(4)(B).

[5]Plaintiffs' Opposition contained a request to amend Plaintiffs' pleadings if any jurisdictional defect were found.

accepted jurisdiction; as such, the State requested and was granted the right to cross-claim to seek Declaratory Relief against the County.

After 27 July 1990 the District Court provided no direction, or permission to introduce further documentary evidence to cure any jurisdictional defect. The Court's only direction to parties was that they provide "replies" to the Amicus Brief. No one submitted any documentary evidence with their replies.[6]

The District Court began the hearing by announcing, before argument was allowed, that it had determined that the 12 (b) Motion to Dismiss should be granted. The Court's decision included the finding that the "Plaintiffs were not original sources" and had not given the required §(e)(4)(B) pre-filing

[6]Plaintiff Uremovic in this reply again requested the right to amend if any jurisdictional defect were found.

communication.

Later, on Reconsideration, a proposed Amended Complaint alleging communication of required facts to the Federal Government was supported by an Affidavit showing this pre-filing communication. The right of Plaintiffs to amend was denied on the grounds that it was late.

The Ninth Circuit altered the District Court's ruling and determined that Plaintiffs "were original sources."

Accepting the finding of the Ninth Circuit that Plaintiffs were "original sources" an amendment which alleges a pre-filing communication to the Federal Government satisfying §3730 (e)(4)(B) would not be futile but would be a thoroughly corrective amendment curing jurisdiction.

The law of the Supreme Court of the United States, Circuit Courts and District Courts, overwhelmingly supports the granting of requests to amend, as stated in Conley v.

Gibson, 355 U.S. 41, 48 (1975):

> "This and the other federal rules 'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits.' "

In the absence of any apparent or declared reason, such as undue delay by movant; undue prejudice to the opposing party by virtue of allowance of amendment; futility of amendment; etc., the leave sought should, as the rules require, be "freely given." Foman v. Davis, 371 U.S. 178 (1962), or as stated by the Fifth Circuit case of Carson v. Polley, 689 F2d 562, 584 (1982):

> "Unless there is a substantial reason to deny leave to amend, the discretion of the District Court is not broad enough to permit denial."

A. DISCUSSION OF DELAY.

This proposed amendment was the first amendment presented by the Plaintiffs.

Moreover the alleged jurisdictional defect, i.e., prior notification by an original source was never raised by a party herein. When the issue was first mentioned by Amicus, Plaintiffs had timely requested (1) the right to amend and (2) before the hearing on Reconsideration had served and lodged with the Court a proposed Amended Complaint to cure this supposed defect. Any delay in considering §(e)(4)(B) pre-filing communication was not caused by the Plaintiffs but by choice and omission of the Defendants.

Even a late amendment to cure a jurisdictional defect has not been considered a necessarily prejudicial delay when made during or after a dismissal, see Rodrigue v. Aetna Casualty Co., 395 U.S. 352, 354 (1969) and that such an amendment is permissible under FRCP Rule 15 (a) where requested within a Memorandum of Opposition to Defendants Motion to Dismiss, see Jadeszko v. Brennan, 418 F.Supp. 92 (E.D. PA, 1976), and after

dismissal, Second Circuit case, Frasier v. Gen. Elect. Co., 930 F.2d 1004, 1008.

B. DISCUSSION OF STATUTORY POWER TO AMEND

The statutory power to amend a defect in jurisdiction, 28 U.S.C. §1653, has been used regularly in modern Circuit Court cases. International Brotherhood of Boilermakers v. Local D354 897 F.2d 1400, 1402 (7th Cir., 1990,); Miller v. Stanmore 636 F.2d 986, 990, (5th Cir.,1981) and John Birch Society v. National Broadcasting Co., 377 F.2d 194, 198-199 (2nd Cir., 1967).

C. DISCUSSION OF POSSIBLE PREJUDICE TO DEFENDANTS.

As in this case where discovery and a trial date were still open, even the Ninth Circuit has held:

> "...an action should not be dismissed for lack of jurisdiction without giving the Plaintiff an opportunity to be heard unless it is clear the deficiency cannot be overcome by amendment."
> DCD Programs Ltd v. Leighton
> 833 F. 2d 183, 186 (1987)

Mere reciting of prejudice is not sufficient

to justify a refusal to amend. U.S. v. Hougham, 364 U.S. 310, 316 (1960). As stated in DCD Programs Ltd v. Leighton, supra, and Yellow Bus Lines, Inc., v. Drivers, Chauffeurs & Helpers, Local 639, 883 F.2d 132 (DCA 1989) where a case is still in the discovery stage, as in this case, there is ample time available for trial preparation, there is little prejudice to the other side and amendment should be allowed.

D. DISCUSSION OF FUTILITY OF AMENDMENT.

An amendment is not futile if it cures a jurisdictional defect found by the District Court and Court of Appeals. While the District Court held that Plaintiffs did not qualify under §(e)(4)(B) as "original sources"; the Plaintiffs had asserted they were "original sources" and the Ninth Circuit determined that the Plaintiffs were "original sources", so an amendment alleging pre-filing communication to the Federal Government would cure any jurisdictional defect and give the Court

subject matter jurisdiction. Such curative amendment should be granted even after a Motion to Dismiss, Gaffney v. Silk, 488 F.2d 1248, 1251 (1 Cir., 1973) and Menasco Inc. v. Warren, 886 F.2d 681, 685 (4 Cir., 1989) and Rodrique v. Aetna Casualty Co., supra, where a jurisdictional amendment was allowed after dismissal.

The matter should be remanded.

ARGUMENT NO. III

THERE WAS SUFFICIENT ABSENCE OF NOTICE AND OPPORTUNITY TO BE HEARD IN THE DISTRICT COURT SO AS TO CONSTITUTE A DENIAL OF DUE PROCESS UNDER THE VTH AMENDMENT.

Defendants' Motion to Dismiss combined many widespread challenges including lack of subject matter jurisdiction for failure to meet the requirements of §(e)(4)(B); lack of subject matter jurisdiction under §(e)(4); a defect under Rule 9 (b); no jurisdiction on the ground of XIth Amendment; and no triable issue of fact under Rule 56.

There was an absolute failure to indicate that there was going to be an attack under §3730 (e)(4)(B) regarding the pre-filing communication to the Federal Government of the general facts regarding the wrongdoing.

The primary attack made by the Defendants was that Plaintiffs were not "original sources" as that title of "original sources" is stated in §(e)(4)(A).

When Plaintiffs' counsel entered the Courtroom expecting the full evidentiary hearing pursuant to their written request, they had received no prior notice of the Court's intended decision. The Court's first statement was that it had tentatively decided to grant the Defendants Motion to Dismiss and allowed the Plaintiffs two counsel a total of ten minutes to present their entire case.

Due to the original lack of notice that pre-communication under §(e)(4)(B) was to be challenged as a defect at any time before closing or time to submit a response to

Defendants Motion, Plaintiffs had not addressed that issue and had no notice so as to present a written motion to amend.

Plaintiffs next opportunity to be heard was the date set for the Motion to Reconsider. Plaintiffs offered a proposed Amended Complaint, which had been served and lodged, and new evidence by way of a dated, signed, federal letter to Plaintiffs disclosing communication of the problems three months before filing of the Complaint. The new evidence offered to the District Court and the Ninth Circuit was as follows:

> "23 May 1988"
> "Dear Ms. Uremovic,"
> "We look forward to receipt of your letter concerning the situations you described in our phone conversation today."
> ...
> "We do conduct periodic reviews for both compliance and fiscal integrity of State/local foster care and adoption programs."
> [Signed] "Ray Myrick
> Chief, Children's Bureau
> Administration for Children, Youth and Families"
> Citing ACYF-IM-85-25, ACYF-PI-86-03

The Courts simply refused this evidence as new evidence.

The lack of (1) of notice of the attack on §3730(e)(4)(B); (2) absence of the notice of any intended decision of the Court; (3) the right to a full and meaningful hearing as requested in writing; (4) the right to present evidence after notice of its need; (5), the right to have a timely written, lodged Amended Complaint accepted; (6) as well as the right to present new evidence; violated procedural due process required under the Vth Amendment. Coe v. Armour Fertilizer Works, 237 U.S. 413, 419, 424-425 (1915) and Mullane v. Central Hanover Bank & Trust, 339 U.S. 306,314 (1950).

FRCP Rule 12(b)(1) requires procedural safeguards equivalent to those in Rule 56, with Rule 56 used selectively as a guide to ensuring fairness. Exchange Nat'l Bank of Chicago v. Touche Ross & Co., 544 F2d 1126 (2nd Cir., 1976). FRCP Rule 12 (b)(1) allows a court to hold a hearing and resolve

conflicting testimony against the plaintiff, Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511-512 (5th Cir.) cert. den. 449 U.S. 953 (1980) otherwise, the dismissal can be sustained only if it meets the standard for dismissal without regard to matters outside the pleading. Gordon v. Nat'l Youth Work Alliance, 675 F.2d 356, 361 (D.C. 1982) citing Conley v. Gibson, 355 U.S. 41, 45-46 (1975).

Plaintiffs request due process.

VIII.

CONCLUSION

Petitioners herein pray that a Writ of Certiorari issue to review the judgments below.

Respectfully submitted,

Grace A. Galligher,
Attorney for Kevin Aslanian, Richard L'Italien and Coalition of California Welfare Rights Organizations

Peter H. Smurr,
Attorney for Georgia Uremovic,
Member of the Bar of the Supreme Court of the United States

UNITED STATES OF AMERICA, ex. rel., and KEVIN M. ASLANIAN; et al.,	)	
Petitioners,	)	ENTRY OF
v.	)	APPEARANCE
GEORGE DEUKMEJIAN, Governor, State of California, et. al.,	)	
Respondents.	)	

PETER H. SMURR, a member of the Bar of the State of California and the United States Supreme Court does make an entry of appearance for the purpose of filing, briefing and arguing this Petition for Writ of Certiorari and subsequent matters and does make this document an entry of appearance for all purposes.

Peter H. Smurr

CERTIFICATE OF SERVICE

I, Diane Aslanian hereby declare that on 14/5 September 1992, I served copies of the foregoing PETITION FOR WRIT OF CERTIORARI on the following:

Daniel Lungren
Attorney General
State of California
1515 K Street
Sacramento, CA 95814

Solicitor General
Department of Justice
Washington, D.C. 20543

Lee Elam
County Counsel
700 H Street, Suite 2650
Sacramento, CA 95814

Lucy Eldridge
Linda Anderson
U.S. Department of Justice
P.O. Box 261
Washington, D.C. 20044

by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 14/5 September 1992 at Sacramento, California.

Diane Aslanian

Supreme Court, U.S.
FILED
SEP 15 1992
OFFICE OF THE CLERK

(2)

92-512

No. 92-

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

UNITED STATES OF AMERICA, ex. rel.,
and
KEVIN M. ASLANIAN; RICHARD L'ITALIEN; GEORGIA UREMOVIC; and CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS,

Petitioners,

v.

GEORGE DEUKMEJIAN, Governor, State of California, et. al.

Respondents.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

Of Counsel
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Additional Listing of Respondents:

LINDA McMAHON, Director, California State Department of Social Services; **STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES;** SACRAMENTO COUNTY, BOARD OF SUPERVISORS; DENNIS HART, Director, Sacramento County Department of Social Services; **SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES,**

Respondents.

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NOT FOR PUBLICATION

UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex. rel., Plaintiff, and KEVIN M. ASLANIAN; RICHARD L'ITALIEN; GEORGIA UREMOVIC; and COALITION OF CALIFORNIA WELFARE RIGHTS ORGANIZATIONS, Plaintiffs - Appellants, GEORGE DEUKMEJIAN, Governor, State of California; LINDA McMAHON, Director, California State Department of Social Services; STATE OF CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; SACRAMENTO COUNTY, BOARD OF SUPERVISORS; DENNIS HART, Director, Sacramento County Department of Social Services; SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES, Defendants - Appellees.	C.A. No. 91-16038 D.C. No. CV-88-1156-RJG MEMORANDUM'

On Appeal from the United States District Court for the Eastern District of California (Sacramento)
Edward J. Garcia, District Judge, Presiding

Argued and Submitted May 14, 1992
San Francisco, California

Before: HUG, SKOPIL, and RYMER, Circuit Judges

This is an action brought pursuant to the False Claims Act, 31 U.S.C. §§ 3729-32 (1988), by a coalition of welfare rights organizations and others to recover damages and civil penalties on behalf of the United states. The plaintiffs allege that state and county officials falsely submitted claims to the federal government to collect payments for the administration of certain federal child to collect payments for the

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

administration of certain federal child welfare services programs. The district court dismissed the action for lack of subject matter jurisdiction. We affirm.

DISCUSSION

The False Claims Act provides that in certain instances civil actions may be instituted by private plaintiffs, who proceed on behalf of the government. 31 U.S.C. § 3730(b); Mortgages, Inc. v. United States Dist. Court for the Dist. of Nevada, 934 F. 2d 209, 210 (9th Cir. 1991). The statute, however, contains numerous exclusions of federal jurisdiction which we have described as "unusually precise." United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1419 (9th Ci. 1991). The district court held that plaintiffs failed to meet one of these jurisdictional exclusions, providing that:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in

> a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (emphasis added). The court concluded that (1) the claims asserted by plaintiffs had been publicly disclosed; and (2) the plaintiffs did not voluntarily provide information relating to their claims to the federal government before filing their action.

We agree that the information

underlying plaintiffs' claims was publicly disclosed prior to the filing of the action. At least one of the documents relied upon by plaintiffs, a state Superior Court civil complaint, was a non-confidential public record. Moreover, as the district court noted, plaintiffs had caused the information to become publicly disseminated in a newspaper article.

Even if the information relied upon by plaintiffs was publicly disclosed, the action is not barred if plaintiffs are the original source of the information. 31 U.S.C. § 3730(e)(4)(A). To qualify as an original source, a person must first have "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). There is no apparent dispute here that

plaintiffs possessed such direct and independent knowledge. Plaintiffs failed, however, to come forward with evidence that satisfied the second element of section 3740(e)(4)(B) -- that they voluntarily provided information to the federal government before filing their action.

Plaintiffs contend that they misconstrued the nature of defendants' motion to dismiss. They believed it to be a facial attack on jurisdiction rather that(sic) a factual attack, and accordingly they failed to submit evidence of their voluntary disclosure. We reject that contention. The motion clearly challenged whether these plaintiffs voluntarily provided information to the government before filing their action. Plaintiffs were

required to come forward with evidence outside the pleadings to demonstrate that they met this jurisdictional requirement. See Trentacost v. Frontier Pac. Aircraft Indus., 813 F. 2d 1553, 1558 (9th Cir. 1987). Plaintiffs failed to offer any evidence on this point and the district court therefore correctly dismissed the action.

Plaintiffs contend that the district court should have reconsidered its decision in light of evidence submitted after dismissal. Plaintiffs failed, however, to offer adequate grounds to explain why they did not present their evidence before dismissal. That failure justifies the district court's denial of reconsideration. See id. at 1557-58 n.4; Frederick S. Wyle, Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985). The

court did not abuse its discretion by refusing to reconsider its order of dismissal. See Fuller v. M.G. Jewelry, 950 F. 2d 1437, 1441 (9th Cir. 1991) (applying abuse discretion standard).

We also find no abuse of discretion in the court's refusal to allow plaintiffs to file an amended complaint. See Jackson v. Bank of Hawaii, 902 F. 2d 1385, 1387 (9th Cir. 1990) (applying abuse of discretion standard). The court reasoned that the proffered amendments were futile and prejudicial to the defendants. Both grounds are sufficient to justify rejection of an amended complaint. See id. at 1387. Moreover, a third factor is relevant here. "Where a party seeking amendment knows or should know of the facts upon which the proposed amendment is based, but fails to include

them in the original complaint, the motion to amend may be denied." Jordan v. County of Los Angeles, 669 F. 2d 1311, 1324, (9th Cir.), vacated and remanded on other grounds, 459 U.S. 810 (1982).

Finally, plaintiff Uremovic objects to the district court's refusal to allow her to intervene in a cross-claim between defendants. Because we affirm the dismissal of the action for lack of subject matter jurisdiction, it is unnecessary for us to reach Uremovic's argument.

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-16038
CT/AG#: CV-88-1156-RJG

UNITED STATES OF AMERICA, ex. rel.,

Plaintiff

and

KEVIN M. ASLANIAN, RICHARD L'ITALIEN, and COALITION OF CALIFORNIA WELFARE RIGHTS ORGANIZATIONS; GEORGIA UREMOVIC; RICHARD L'ITALIEN

Plaintiffs- Appellants

v.

GEORGE DEUKMEJIAN, Governor, State of California, LINDA McMAHON Director, California State Department of social Services,; SACRAMENTO COUNTY, BOARD OF SUPERVISORS, DENNIS HART, Director of Sacramento County Department of Social Services and SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICE.

Defendants - Appellees

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court, that the _____ judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered June 17, 1992

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and Cross-Complainants

UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATE OF AMERICA, ex rel., KEVIN M. ASLANIAN, et al.,	)	No. Civ. S-88-1156-EJG
Plaintiffs,	)	ORDER
v.	)	
GEORGE DEUKMEJIAN, et al.,	)	
Defendants.	)	

This cause came on regularly for hearing before this Court on qui tam plaintiffs' motion for reconsideration of an Order entered by the Court on

January 3, 1991, granting defendants; motions to dismiss for lack of subject matter jurisdiction.

Plaintiff Uremovic was represented at the hearing by Peter Smurr, Esq. Plaintiffs Aslanian, L'Italien, and California Coalition of Welfare Rights Organizations were represented by Grace A. Galligher, Esq. County defendants were represented by Steve P. Rudolph, Deputy County Counsel, and the state defendants were represented by Darryl F. Mansfield, Deputy Attorney General.

The Court, having read and considered the written arguments in the favor of, and in opposition to plaintiffs' motion, orally announced its analysis and determination on the record that the motion to reconsider should be denied. A copy of the reporter's

transcript of the hearing on this matter is attached as Exhibit A and incorporated by reference. The Court directed counsel for state defendants to prepare a summary order.

THEREFORE, IT IS HEREBY ORDERED, that plaintiff's Uremovic, Aslanian, L'Italien, and California Coalition of Welfare Rights Organizations' motion to reconsider is denied.

DATED: April 23, 1991

/s/
EDWARD R. GARCIA
United States District Judge

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATE OF AMERICA, ex, rel., KEVIN M. ASLANIAN, et al., Plaintiffs, vs. GEORGE DEUKMEJIAN, et al., Defendants.	Case No. Civ S 88-1156-EJG-EM ORDER

On November 1, 1990, at 11:00 a.m., this cause came on regularly for hearing before this court on Sacramento County defendants' Motion to Dismiss, or in the alternative, for Judgment on the

Pleadings, filed on July 9, 1990, and joined in by State defendants on July 12, 1990.

County defendants were represented at the hearing by Steven P. Rudolph, Deputy County Counsel; State defendants were represented by Darryl F. Mansfiled, Deputy Attorney General; plaintiffs Aslanian, L'Italien and California Coalition of Welfare Rights Organizations, Inc. were represented by Grace A. Gallagher(sic), Esq; and plaintiff Uremovic was represented by Peter Smurr, Esq.

The court having read and considered the written arguments in favor of, and in opposition to, defendants' motion, and having read and considered the amicus curiae brief filed by the United States and replies

thereto, and having heard and considered the oral argument of plaintiffs counsel, orally announced its analysis and determination on the record that the motion to dismiss should be granted and directed counsel for County defendants to prepare a summary order.

THEREFORE, IT IS HEREBY ORDERED that defendants motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is granted.

DATED: January 2, 1991

/s/
EDWARD J. GARCIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
EDWARD J. GARCIA, JUDGE

UNITED STATES OF AMERICA, ex rel.KEVIN M. ASLANIAN, RICHARD L'ITALIEN, COALITION OF CALIFORNIA WELFARE RIGHTS ORGANIZATION, a non-profit corporation and GEORGIA UREMOVIC,	) CIV S-88-1156-EJG-EM
Plaintiffs,	
vs.	
GEORGE DEUKMEJIAN, Governor, State of California, LINDA McMAHON, Director California State Department of Social Services, SACRAMENTO COUNTY BOARD OF SUPERVISORS, DENNIS HART, Director of Sacramento County Department of Social Services, and SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES,	
Defendants.	

REPORTER'S TRANSCRIPT

PLAINTIFFS' MOTION FOR RECONSIDERATION OF DEFENDANTS'MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

THURSDAY, MARCH 7, 1991

JAMES G. VINE, CSR 1515
OFFICIAL REPORTER
UNITED STATES DISTRICT COURT
SACRAMENTO, CALIFORNIA

APPEARANCES

For the Plaintiffs Aslanian, L'Italien and Coalition of California Welfare Welfare Rights Rights Organizations, Inc.:	GRACE A. GALLIGHER Attorney at Law Coalition of California Welfare Rights Organization, Inc. 1901 Alhambra Blvd. 2nd Floor Sacramento, CA 95816
For the Plaintiff Georgia Uremovic	PETER SMURR Attorney at Law P.O. Box 505 5738 Marconi Ave. Carmichael, CA 95608
For the Defendant County of Sacramento	L. B. ELAM County Counsel By: STEVEN P. RUDOLPH, ESQ. Deputy County Counsel 700 H Street, Suite 2650 Sacramento, CA 95814
For the Defendants George Deukmejian	JOHN K. VAN DE KAMP

and Linda McMahon:	Attorney General By: DARRYL MANSFIELD, Deputy Attorney General 1515 K Street P.O. Box 944255 Sacramento, CA 94244-2550

SACRAMENTO, CALIFORNIA,
THURSDAY, MARCH 7, 1991

THE COURT: Good morning, counsel.

This is USA, ex. rel, Aslanian, et al., against State and County defendants.

You want to announce your appearance, please; for the plaintiffs?

MR SMURR: For the plaintiffs, Peter Smurr, for the Plaintiff Uremovic.

THE COURT: Mr. Smurr.

MS. GALLIGHER: Grace Galligher for Kevin Aslanian, Richard L'Italien and CCWRO.

THE COURT: Ms. Galligher.

MR. RUDOLPH: Steven Rudolph, Your Honor, for the County Defendants.

THE COURT: Mr. Rudolph.

MR. MANSFIELD: If is please the Court, Darryl mansfield for the State Defendants from the Attorney General's office.

THE COURT: Mr. Mansfield.

Amicus, USA, apparently has not shown up and they didn't file anything, although understand they have been served with copies of all the pleadings on the matter.

the case is on calendar on plaintiffs' motion for reconsideration of an order entered by the court on January 3 of this year granting defendants' motions to dismiss for lack of subject matter jurisdiction.

Your motion for reconsideration, Mr. Smurr and Ms. Galligher, at least, slightly puzzled me. We have a Local Rule which addresses motions for reconsideration and neither of you address it.

Any particular reason, Mr. Smurr?

MR. SMURR: I'm sorry Your Honor, we

did not do what?

THE COURT: You can't hear me?

MR. SMURR: No, I did, but i messed it up, just that first statement I didn't.

We were supposed to do something and I heard everything --

THE COURT: -- No, no, you don't have to do anything, Mr. Smurr.

What i said was, I'm puzzled by the fact that neither of the plaintiffs addressed our Local Rule 230(k) on a motion for reconsideration. We went to a lot of trouble of drawing up that Rule.

MR. SMURR: Your Honor, I'm afraid i overlooked that application of 230(k) for a motion to reconsider.

THE COURT: Okay. Ms. Galligher?

MS. GALLIGHER: Unfortunately i overlooked it as well, your Honor.

THE COURT: Because you overlooked it, of course, the defendants don't respond. One of my functions is to review and analyze your motion for reconsideration, not only under Federal Rule and applicable law, but also under our Local rule, and I'm going to do that.

Even more inexplicable is plaintiffs' citation to Federal rule 51 which doesn't seem to be applicable here.

Any particular reason why plaintiffs are moving pursuant to Federal rule of civil Procedure 51 for reconsideration, Mr. Smurr?

MR. SMURR: Your Honor, I think we cited rule 59, there was also a cite to Rule 51, which was not on my basis, but I remember bringing 59 before and putting 59 --

THE COURT: -- I read the briefs.

Why do you move under Rule 51?

MR. SMURR: I also moved under, I believe, Your Honor, Rule 59.

THE COURT: I know that, my question is, why are you moving under Rule 51?

MR. SMURR: I believe Ms. Galligher's going to explain that.

THE COURT: Okay. ms. Galligher. It applies to jury trials and that's why I'm curious, you didn't have a jury trial in this case, and I think that's what you're complaining about.

MS. GALLIGHER: That is correct, Your Honor; however, there was a request for a jury trial pursuant to the false claims complaint.

THE COURT: And that's why you're moving for reconsideration under Federal Rule 51, because you had a jury demand in your complaint?

MS. GALLIGHER: No, I'm not, but the complaint was to be based under the jury, so that's why I moved, Your Honor.

THE COURT: It's completely inapplicable and it defied analysis as to why you're moving under Federal 51.

You do seem to move under Rule 59 which the only applicability of that section would be under subdivision (e), and you give no analysis of 59(e) reason for reconsideration. And the one case that's cited doesn't support you.

I'll hear form plaintiffs' counsel now on the motion for reconsideration. I'd like you to address reconsideration that's your problem this morning, is reconsideration, not the merits. You don't seem to be moving under rule 60, Federal rule 60.

Mr. Smurr or Ms. Galligher, you wish

to argue the matter further?

MR. SMURR: Thank you, Your Honor, Mr. Smurr would like to make a statement.

I believe that we are moving under the proper section.

THE COURT: Which proper section is that:

MR. SMURR: Rule 59, and the applicable section of Rule 59, is, I think a general allegation and we're moving under that section is applicable insofar as it state that wherever there has been a discovery of any new evidence which has come up which would be supplied and have a determination on the true merits of the case, which was -- with diligence and in good faith and not presented earlier, is either because there was not sufficient notice to present it, or because it was not

available at the -- not known to be available at that time, but was in existence.

The problem which we had, that's one area.

The other are, Your Honor, would be as I have stated n my first part, that we were -- and we request reconsideration because we believe we did not have any notice and change to argue, which of course is a matter dealing with, actually the due process rights or whatever we wished. But, there was an error of law of the Court which we would like to bring to the Court's attention that we really did not have notice that we were going to have to argue factual issues the way this all turned out.

We were presented, as you are aware, and we've gone over this, i don't want to

kick a dead horse, so to speak, but when we came to that hearing after commenting on the amicus brief, it was our understanding going into this that we had a facial attack on jurisdiction. The gentlemen for the defendants, the County's and the State joined, did not present a single exhibit to those except some interrogatories, but nothing in any way affected the -- anything in the complaint and the allegations on the face of the complaint. We came in prepared to do that and then at that hearing, which was short, and because we didn't ask for more time, we did have a situation where all of a sudden there was this stuff throw at us.

I immediately commented and consulted with my client, who is not in Sacramento and who's down in Visalia,

California, and said, "I did contact the Federals and we did do this," and I did go back into the record and find that we had supplied even the information that was in the letter presented in the interrogatories as stated. So we do have a double problem which we tried to present.

I'm not going to go into the amendment right no, although that should be noted that we continually asked for the right to amend. We think we should have the right to amend.

THE COURT: Incidentally, we couldn't find that.

In your previous papers you say you moved to amend on this prior motion?

MR. SMURR: I don't know if I can find it right now, Your Honor, but I'm positive, absolutely positive, that in

the answer to the motion to dismiss, and at all times in those pleadings my reply definitely requested one, a full hearing on the matter and a right to amend, I can recall almost --

THE COURT: -- What do you mean your reply, you weren't the moving party?

MR. SMURR: We responded to the motion, then the response to the motion to dismiss is where we stated it. And Your Honor, we cited a very distinct Federal Supplement case and we cited at length.

My gosh, if there's one thing that's always got to be done you've got to give a guy a chance in Federal procedure to amend if it's possible to amend if it's within that time frame, I believe.

THE COURT: Well, there's other reasons why your motion to amend is a

little late.

What you have before me this morning is a motion for reconsideration of a judgment entered by the Court and you have to show me why I should set aside that judgment, not alter or amend it, or vacate it, and you don't address factors that a Court is called on to review on a motion for reconsideration of a final judgment, and it has nothing to do with amending.

MR. SMURR: Your Honor, excepting for the moment -- or not addressing, or replying to that, I think I should ask to proceed to answer what you asked me t do just now and earlier, and that would be; why we are at this stage we are and what we think are the merits of reconsideration.

I understand the situation, Your

Honor, and without arguing the order as it came out, it was clear that from your decision, and correct me if I'm wrong, that yo bought the Federal Government's amicus argument that you;re not an original source and the reason for you're not being an original source is, one: There is probably also public disclosure of the document before it was presented to the Government. We show now that we presented this to the Government, not to the Department of Justice.

THE COURT: I know, but, see, what you're overlooking, Mr. Smurr, is you're on a motion for reconsideration and you ought to address reasons why I should reconsider.

Now let me point out to you first of all, let me read to you our Local Rule 230(k) if I can find it in my notes.

"Whenever any motion has been granted or denied in whole or in part, and a subsequent motion for reconsideration is made upon the same or any alleged different set of facts, it's the duty of counsel to present t the judge or magistrate to whom such subsequent motion is made an affidavit or brief as appropriate setting forth the material facts and circumstances surrounding the motion for which reconsideration is sought, including: (3) what new or different factor or circumstances are claimed to exist which did not exist or

were not shown upon such prior motion, or what other ground exist for the motion."

Now, that's the standard and you're not addressing it, and you sort of gloss over it in your brief.

In addition to that, let me cite you a case, i don't expect you to be familiar with it because it's not mentioned in your briefs, it's a 1985 Ninth Circuit case, Frederick S. Wyle Professional corp. vs. Texaco, Inc. It's found at 764 Federal Second 604. That case holds that a denial of a motion for reconsideration pursuant to rule 59,which you do cite, will not be reversed absent abuse of discretion. It goes on to teach, that to support a motion for reconsideration of a grant of summary judgment, which is really what this was, and that case

explains that it was really a summary judgment motion, or could be treated as one, for reconsideration of that type of a judgment based upon newly discovered evidence, the movant must show evidence was newly discovered or unknown until after the hearing, and it could not have been discovered and produced at the hearing with reasonable diligence.

Now, that's another standard in addition to our Local rule which requires you to show something not in existence or unable to be found prior to the motion, but this case also does under rule 59 and you don't address that and that's the problem, that's why I started out this morning by advising plaintiffs' counsel that I'm somewhat puzzled by your motion for reconsideration.

MR. SMURR: Your Honor, what I'd

like to address now, I thought, and I do believe we certainly attempted to do that, and of course we did supply three affidavits and the documents from Plaintiff Uremovic showing that in fact she had new evidence which she had not been able to located because she had supplied the evidence which had been n the cover letter but not the cover letter. And the question was -- the first time we really knew we had to have some previous contact with he Federal Government to preserve our rights, and so therefore on the discussion of this thing with --

THE COURT: Hold it, hold it just a minute, please.

You didn't know that until the hearing ont the motions:

MR. SMURR: I did not -- my client

did not know at the time of the hearing of the motion that, one: She had to present any facts, firstly; and secondly, she thought she had give what she was required to do, in presenting them to the Federal Government and the complaint was sufficient.

THE COURT: Well, Mr. Smurr, I don't expect that your client would know these things. You're charged with that responsibility and should have, and in a minute I'm going to explain why I believe that.

Ms. Galligher, I'll hear from you if you wish to address something that's not covered in your briefs.

MR. SMURR: Your Honor, could I state though just as to the letter, I had --

THE COURT: -- Go ahead, I'll give

you a minute to wind up, mr Smurr.

MR. SMURR: I had never seen that letter before and I knew nothing of its existence.

Secondly, in closing, the biggest argument we are trying to get across that we have not had time to provide factual evidence regarding our jurisdictional issue. We had no notice of it and we wish to have notice and we wish to have a full hearing on it and we request from you the right to amend.

Thank You.

THE COURT: In a brief oral analysis I'm going to show, Mr. Smurr, why I believe you're wrong. The main reason being, that even if this issue were raised in the initial reply briefs we continued the hearing to give the amicus a change to brief the matter and then

reopened briefs and gave you an opportunity, a second opportunity, to reply. You had over a month after you should have realized that a factual attack was being made on your claim of jurisdiction in this court. You should have at least caught it during those thirty days that you had a chance to study it, it had to be at least thirty day.s

Ms. Galligher, is there anything you want to add?

MS. GALLIGHER: yes, Your Honor.

When i was reading the cases, Trentacosta, Pettis, they all indicated that it was the defendant who had to controvert the jurisdiction. And when they filed their motion to dismiss in July that is what I was basing my assumption on, is that I looked at the

pleadings, I looked at the case law and the defendant had not produced any documents which controverted our jurisdiction, except an attack. i assumed, wrongfully I suppose, that it was a facial attack rather than a factual attack.

The amicus brief, although it did talk about jurisdiction and do it, it wasn't the responsibility of the amicus to challenge, it was the defendants', and since the defendant was the moving party I was basing my response on what the defendant had filed.

THE COURT: Well, the problem with that analysis is that they did come forward with the evidence and proof, and when they did that, the burden shifted back to you to respond and you can no longer rely on your pleadings and you had

plenty of time to respond.

MS. GALLIGHER: However, for the ruling that I had got, or from the instructions that I had received from the Court that we were to respond to the amicus brief and not to the defendant, as far as --

THE COURT: -- Now just a minute, justa minute, ma'am.

All issues were before the Court on the continued hearing. As a matter of act, your briefs on that, I didn't go back and read the, but my notes indicate that you were considering the defendants' motions as a failure to state a claim under 12(b)(6). Now, wherever you got that impression I don't know. The motion was under 12(b)(1) for lack of jurisdiction and they presented evidence of that, and when that happened, under

the cases and the law, you had to respond and you didn't.

What I'd like to hear, because you're on a motion for reconsideration, is why you didn't,

MS. GALLIGHER: We were concerned that it would be changed into a summary judgment motion under rule 56 and that is why we did not file any kind of affidavits.

THE COURT: This case I cited to you has an analysis that treats the factual attack for lack of subject jurisdiction with evidence akin to a Rule 56(e) motion. In fact, I think rule 56(e) specifically says that. let me check real quickly here.

yes, that case I just cited to you, it cites in the last paragraph, or the last couple of sentences of rule 56(e):

That when evidence is presented on the summary judgment notion an adverse party may not rest upon the mere allegations or denials of their pleadings, but must respond by affidavit or otherwise.

Anything else you want to add, ms. Galligher?

MS. GALLIGHER: No.

THE COURT: Mr. mansfield, and Mr. Rudolph, if you submit this matter, the motion for reconsideration, I'm going to deny it for reasons that i'll(sic) explain and give some brief summary analysis of my reason

Is the matter submitted?

MR. RUDOLPH: Yes, Your Honor.

MR. MANSFIELD: Yes, Your Honor.

THE COURT: The motion for reconsideration will be denied.

It's important to not in this care

and in the prior ruling of the Court, that a motion to dismiss for lack of subject matter jurisdiction may take one of two forms: a facial attack or a factual attack. A facial attack merely questions the sufficiency of the jurisdictional allegations in the complaint. A factual attack challenges the actual existence of subject matter jurisdiction. When the court's(sic) actual jurisdiction is properly controverted by the moving party, the party invoking the Court's jurisdiction has the burden of proving the existence of jurisdiction. to do so, plaintiff may not simply rely cn the allegations of the complaint, but must submit evidence from other sources, such as affidavits or depositions.

As the Trentacosta care teaches,

which you were aware of apparently and which you cited, the requirement that the non-moving party present evidence outside his pleadings in opposition to a motion to dismiss for lack of subject matter jurisdiction is the same as that required under rule 56(e), that is, the rule that I just read to you, that the non-moving party tc a motion for summary judgment must set forth specific facts, beyond his pleadings, to show that a genuine issue of material fact exists. Trentacosta then cites the U.S. supreme Court Trilogy of Celotex, Anderson and Matsushita on that principle. On this motion for reconsideration it's important to note that.

I've already indicated that Federal Rule 51(e), under which plaintiffs move for reconsideration, is clearly

inapplicable. The court will consider the matter under our Local rule 230(k) and Rule 59.

Under Rule 59(e), motion to alter or amend a judgment, plaintiffs present no authority regarding the standards applicable for a motion for reconsideration under that rule.

County Defendants do cite one case on the standard. On the Court's independent research we came up with this Fredercik S. Wyle Professional corporation against Texaco, Inc., case that I've cited to you. it also stands for the proposition that the 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is treated as a 56(e) motion for summary judgment.

Under Local Rule 230(k), part of the analysis is to determine whether or not

newly discovered evidence exists. As I understand the plaintiffs' briefs, they do contend they have newly discovered evidence demonstrating plaintiffs are original sources. However, plaintiffs have not show that the evidence submitted, declarations with attached letters from 1987 and 1988, were not within plaintiffs' possession at the time of the last hearing in November of 1990. Therefore, under both the Federick S. wyle case and Local rule 230(k), they have not shown entitlement to reconsideration on the basis of newly discovered evidence.

Plaintiffs do raise some arguable issues as to justification for failing to present previously the declarations and exhibits they now wish to present.

Plaintiffs contend that they

properly believed defendant's motion to dismiss constituted a facial challenge to jurisdiction, requiring the Court to look only at the sufficiency of the jurisdictional allegations of the pleadings, rather than a factual attack requiring the plaintiffs to prove jurisdiction with evidence beyond the pleadings. Along those lines, they also argue that this Court improperly considered matters outside the pleadings without first notifying plaintiffs of the intention to do so.

it's clear that the prior motion that the County Defendants stated the standard for review in this case on the motions, that is the motion to dismiss, and cited Trentacosta. The jurisdictional challenge was based on the grounds that, one: Plaintiffs failed to

provide proper notice to the Federal Government; and, two: Plaintiffs; action is based upon public documents. In support of those arguments at the prior hearing, defendants submitted an inch-high stack of exhibits containing the plaintiffs; answers to interrogatories and responses to requests for production of documents. Nothing in the County's brief on that motion to dismiss could be read as attacking the sufficiency of the complaint's jurisdictional allegation. It should have been clear to plaintiffs that the motion was directed at the factual basis for the Court's jurisdiction.

it may be that plaintiffs focussed on the alternative basis for the defendants' motion to dismiss, which was separately addressed in another portion of their brief. That part of the motion

did attack he sufficiency of the allegations in the complaint; however, it is difficult to see how that could have confused plaintiffs since that part oft he County Defendants' brief attacked the sufficiency of the allegations in the complain relating to stating a cause of action, it did not address jurisdiction. if plaintiffs failed to give proper consideration to the County Defendants' brief on the subject matter jurisdiction issue, they did so at their own peril and should not be heard to complain at this late date.

Not explained is why both of the opposition briefs submitted by plaintiffs addressed the motion as a motion to dismiss pursuant to Federal Rule 12(b)(6) rather than pursuant to 12(b)(1). However, the county defendants at that

prior motion specifically identified rule 12(b)(1) as the basis for their motion and even cited rule 12(h)(3) as the basis for bringing their Rule 12(b)(1) motion subsequent to the filing of their answer. In their reply brief, the defendants again cited these two rules, 12(b)(1) and 12(h)(3) in bold underscored type, placing plaintiffs on notice that plaintiffs had applied the wrong standard in their opposition briefs, and the wrong burden of proof to their arguments on the motion to dismiss.

ordinarily, plaintiffs might plausibly argue that they didn't realized their mistake until they read the reply brief and by then it was too late for them to respond with evidence. However, as I've already noted, plaintiffs' briefs in opposition to the County and State

motions was not their last opportunity to brief the jurisdictional issue because on August 14 of 1990, the Court issued a Minute Order resetting the hearing and establishing a deadline for the Federal Government to file its amicus brief and subsequent deadlines for all other parties to file reply briefs thereto. Amicus supplied copies of the materials submitted to the Federal Government by plaintiffs. The amicus brief also addressed all issues previously raised by the parties, including the jurisdictional issue, thereby giving plaintiffs and additional opportunity to respond with evidence of the Court's jurisdiction. Plaintiffs again failed to present any evidence of the Court's jurisdiction.

Because defendants properly controverted the actual existence of

subject matter jurisdiction, the burden shifted to plaintiffs to establish jurisdiction with evidence from sources outside the pleadings. That is the teaching of the Trentacosta case previously cited by the Court. Based on that case, it was not improper for the Court to consider the materials outside the pleadings submitted by defendants and amicus. Moreover, the County Defendants' briefs gave plaintiffs adequate notice that the Court could and should consider materials outside the pleadings, so the Court did not err in failing to give plaintiffs additional warning that defendants' evidence would be considered. And the cases the plaintiffs cited don't support a contrary proposition.

Plaintiffs lastly argue that the jurisdictional issue is so intertwined

with the merits of their claim that submission of the issue to the trier of fact is required, citing cases. While plaintiffs have correctly identified the legal concept, apparently they fail to understand that the jurisdictional issues may be resolved short of trial in a manner similar to summary judgment that's explained in the very cases they cite on this motion for reconsideration and also in the Trentacosta case previously cited. Because plaintiffs have failed to show a genuine issue of material fact on the question of the Court's subject matter jurisdiction, at that prior hearing, they are not now entitled to an evidentiary hearing, as they argue.

The Court finds that plaintiffs have not shown just cause for failure to submit to the Court previously the

declarations and exhibits they now wish to present. Therefore, the motion for reconsideration does not meet the requirements of Local rule 230(k) or Federal Rule 59 and is now denied.

In essence, what plaintiffs are doing on this motion for reconsideration, without showing cause, is asking for another opportunity to present evidence. The changes that they request to make by amendment do not cure the jurisdictional defects because evidence of jurisdiction has not been attached as exhibits. Nor should plaintiffs be allowed even another additional opportunity to do so. The defendants in this case properly controverted jurisdiction, plaintiffs failed to present any evidence showing a genuine issue of material fact on the jurisdiction issue, and the Court

believes the matter was properly dismissed for that reason. Defendants are entitled to some finality to litigation.

Will you prepare a summary order to that effect, Mr. Mansfield, or Mr. Rudolph, and submit that to the Court within ten days. And if you wish, you may submit a Reporter's transcript of the Court's oral analysis of the denial of the motion.

Thank you, counsel.

MR. SMURR: Your Honor, would it be permissible at this time for plaintiff to request a full judgment on this because obviously we're going to probably be going further on this.

THE COURT: I think I've entered a final judgment, haven't I Mr. Mansfield?

MR. SMURR: I meant on this motion;

excuse me, Your Honor.

THE COURT: Just a minute please.

Haven't I entered a final judgment on the motion that I granted you last time?

MR. RUDOPLH: Yes, you did Your Honor.

MR. MANSFIELD: Yes, you did.

MR. SMURR: You have, your Honor.

THE COURT: That's all you need. They'll prepare another order denying your motion for reconsideration and you take that all the way to the Supreme Court, Mr. Smurr.

MR. SMURR: I hope we don't have to, Your Honor.

(WHEREUPON, the proceedings in the foregoing matter were concluded.)

CERTIFICATE OF REPORTER

I, **JAMES G. VINE**, Official Reporter, certify that the foregoing 24 pages constitute a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

DATED: March 26, 1991

/s/
JAMES G. VINE, CSR 1515

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
EDWARD J. GARCIA, JUDGE

UNITED STATES OF AMERICA, ex rel. KEVIN M. ASLANIAN, RICHARD L'ITALIEN, COALITION OF CALIFORNIA WELFARE RIGHTS ORGANIZATION, a non-profit corporation and GEORGIA UREMOVIC,	)
Plaintiffs,	)
vs.	) CIV S-88-1156-EJG-EM
GEORGE DEUKMEJIAN, Governor, State of California, LINDA McMAHON, Director California State Department of Social Services, SACRAMENTO COUNTY BOARD OF SUPERVISORS, DENNIS HART, Director of Sacramento County Department of Social Services, and SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES,	)
Defendants.	)

REPORTER'S TRANSCRIPT

OF DEFENDANTS' MOTION TO DISMISS OR

ALTERNATIVE MOTION FOR JUDGMENT ON

PLEADINGS

Thursday, November 1, 1990

TRANSCRIPT OF PROCEEDINGS

CSR License No. 1515

JAMES G. VINE
Official Reporter
United States District Court
Sacramento, California

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For the Plaintiff Georgia Uremovic	PETER SMURR Attorney at Law P.O. Box 505 5738 Marconi Ave. Carmichael, CA 95608
For the Defendant County of Sacramento	L.B. ELAM County Counsel By: STEVEN P. RUDOLPH, ESQ. Deputy County Counsel 700 H Street, Suite 2650 Sacramento, CA 95814
For the Defendants George Deukmejian and Linda McMahon:	JOHN K. VAN DE KAMP Attorney General By: DARRYL MANSFIELD, Deputy Attorney General 1515 K Street

Sacramento, CA
94244-2550

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Sacramento, California

Thursday, November 1, 1990

THE COURT: This is Civil case Number 88-1156, Kevin Aslanian, et al., and Georgia Uremovic, is it, mr. Smurr?

MR. SMURR: It is Uremovic.

THE COURT: Uremovic against George Deukmejian as Governor and the Sacramento County Board of Supervisors, defendants.

Will counsel please announce their appearances?

MR. SMURR: For plaintiff Uremovic, you Honor, peter Smurr, Attorney at Law.

THE COURT: Mr. Smurr.

MS. GALLIGHER: Grace Galligher, Attorney for plaintiffs CCWRO, Kevin Aslanian and Richard L'Italien.

THE COURT: All Right. Thank you,

Miss Galligher.

And for the State defendants?

MR. MANSFIELD: Darryl Mansfield, your Honor.

THE COURT: Okay, Mr. Mansfield.

The Federal amicus called the Court and waived appearance today at the hearing.

This case is on calendar on all defendants 12(b)(1) motion to dismiss for lack of subject matter jurisdiction; or, in the alternative, for judgment on the pleadings, since they had filed answers.

I'll take up the 12(b)(1) motion first.

procedurally, after the briefing was in on the motion, as originally scheduled for hearing, the Federal Government requested time to file an

amicus brief. Since the Court's crowded calendar necessitated continuing the hearing then scheduled anyway, we set a filing date for the amicus brief, allowing additional time for all parties to respond, and rescheduled the motion.

The Federal Government has now filed its amicus brief pursuant to Section 517 of Title 28, and all parties have filed responses thereto, except the State defendants did not file a response to the amicus brief; is that correct?

MR MANSFIELD: That's correct, your Honor.

THE COURT: Okay. Frankly, I am impressed by the Federal amicus brief, and I'm inclined to grant all defendants motions to dismiss for lack of subject matter jurisdiction.

I've read the briefs on the issue,

including the replies to the Federal Government's amicus brief, and I'll allow plaintiffs' counsel, if they wish, to argue the matter, bringing to my attention anything that you thing that I may have overlooked, or to emphasize any point that either plaintiffs' counsel wish to make.

Miss Galligher, you wish to argue the matter further?

MS. GALLIGHER: yes, your Honor.

In the attachments --

THE COURT: -- I'll ask you to argue from the lectern so we can all hear, over the microphones, please.

MS. GALLIGHER: Your Honor, in the attachments that was submitted to the Court by Mr. Smurr in his response, and also the attachments submitted in the amicus brief, included the statements

and information that we had sent to the Federal Government.

Basically, the information set the stage of what should have been happening under the Title 4(e) program. The basis for this complaint is that the defendants had indicated to the Federal Government that they were complying with 4(e) procedures and providing fair hearings and notices of actions to children and recipients of child welfare services.

Based on those claims, the Federal Government forwarded money, federal funds, to the State defendants, who they dispersed it to the County. Instead of providing these services, they refused, or did not provide the services, while they were still getting the money.

THE COURT: I think you

misunderstood my offer to have you argue on oral argument now, Miss Galligher. I've read the briefs, I'm familiar with the theory of this qui tam action. I know what your contentions are.

I've tried to narrow the argument because the two of you together only have ten minutes to argue the matter; neither of you requested extended oral arguments, and our local rules provide for ten minutes per side.

The reason I said what I did and gave you my notice of intended decision is so that you could -- it's to focus on the issues that are before me and to see if there's something that you can add which might cause me to reconsider.

What you've said so far, in five minutes, has told me nothing in connection with the issue that's before

the Court.

MS. GALLIGHER: Well, I said that in order to introduce, if you look at the exhibits, there was nothing that was sent to the Federal Government, there have been no papers that were sent to the Federal Government, or contained by the Federal Government, or publicly disclosed to the Government that indicated that Sacramento County --

THE COURT: -- I don't know what you mean by"contained by the Federal Government." what does that mean?

MS. GALLIGHER: That they possessed, that they had.

THE COURT: Finish your sentence, I interrupted you. I just didn't know what you meant by someone containing something.

MS. GALLIGHER: The papers, the

pleadings, the things that were publicly disclosed, I assume, is one of the reasons for the dismissal. Nothing --

THE COURT: -- Well, you yourself submitted public documents.

MS. GALLIGHER: That's true, your Honor, but nothing in the documents said that Sacramento County was violating Federal 4(e), nothing.

THE COURT: So then why did you send them?

MS. GALLIGHER: Because it showed a policy. We went to a fair hearing. One of the arguments that we made were the jurisdiction. The fair hearing decisions came back saying we did not have jurisdiction.

Nothing in the report, the fair hearings themselves, said Sacramento County does not have jurisdiction,

Sacramento County has not given any NOAs, that is why we feel that we have jurisdiction, there has not been anything publicized that would indicate that they have violated Title 4(e), and those exhibits go to confirm that.

THE COURT: Okay. Mr. Smurr.

MR. SMURR: thank you, your Honor.

Your Honor, you stated that you are -- your intention is to allow the dismissal on all grounds, and I' rather at a loss to which to start addressing I wonder if the Court --

THE COURT: No, no, I didn't say all grounds, I said that I'm inclined to grant the 12(b)(1) motion as to all defendants.

MR. SMURR: Was that based upon the concept that there was, in fact, then no subject matter jurisdiction before the

Court?

THE COURT: That's what 12(b)(1) is all about.

MR. SMURR: and based on this, may I ask if the Court has made a decision whether the plaintiffs are proper original parties?

THE COURT: You mean as to whether they're qualified as an original source?

MR. SMURR: Original source, thank you, your Honor.

THE COURT: No, in my opinion, they do not so qualify as that term is defined in the statute.

MR. SMURR: And are they then considered, under you ruling, also ruled out because they submitted only matters which were public to the Federal Government at the time the suit was commenced?

THE COURT: That's true, also.

MR. SMURR: and is it your decision and ruling, then, further, that there was -- do we accept the Federal Government's amicus brief that the State of California and the County are proper parties under a False Claims Act?

THE COURT: I don't understand that question.

MR. SMURR: it was argued by the Federal Government that the claims act does constitute proper area for determining the validity of claims submitted under budgetary acts supposedly by the County and by the State, and that there can be a false claim that does exist, even though the parties is a state of one of the unions.

THE COURT: Okay, I understand now. I'm not reaching any other issue, those

arguments are made in connection with the alternative motion for judgment on the pleadings, and I'm not going to reach that because i don't think the Court has jurisdiction.

MR. SMURR: And then, one other, just so we can understand. Did you decide anything under Rule 9(b), the insufficiency --

THE COURT: -- No, I don't have to analyze that.

MR. SMURR: Okay, I now understand which way I should go.

THE COURT: You've already used up most of your time. It isn't often that I allow myself to be interrogated by counsel in law and motion, Mr. Smurr. I've allowed you to do it because you may want some clarification of my ruling, and I'm now prepared to make it.

MR. SMURR: Your Honor, before you do, I would like to address the matter.

I am in this case totally as an objective attorney who thought there was a good cause here. The matter that has been before you is presented in a manner which I think all parties indicate are matters which are complicated and required a deep amount of research and information in order to even understand the basic concept of a false claim action herein.

That in this action, there has been, to the best of my knowledge, reviewing all the cases that I could find, a comparable case where the amount of work has been put in by these plaintiffs has ever been shown.

I think that in view, as I state in my briefs, but also as I've stated, as

should be acknowledged herein, within the intent of Congress and the administration as shown by their pleadings, this is a case where we feel that, without any question, these people are proper plaintiffs and we would deeply ask you to re-examine those cases which have been presented to you and the understanding that in the Federal amicus brief they did not address the fact that there were only parts of these actions which were publicly disclosed, and there are many parts which were not publicly disclosed prior to the presentation to the Federal Government.

Miss Uremovic presented the affidavit with hers, which was actually received by the Federal Government and acknowledged showing that she had private information concerning all these

things.

Your Honor, I would deeply ask the Court to re-review these matters, and I would strongly suggest that rather than starting a proceeding now which is undoubtedly going to have to be reviewed in a higher authority, I would profoundly ask that this is the time and is proper for this case to go forward to trial.

Thank you, your Honor.

THE COURT: The problem with what you're suggesting, Mr. Smurr, is that the statute bars these qui tam actions under certain circumstances, and that statute barring these action, apparently, was broadly construed; that is, the bar was broadly construed in the -- I think it was the Second Circuit case that was attached to the amicus

brief.

You're arguing for a somewhat narrower interpretation of that bar, and I understand the arguments that you make in your brief as the reasons. I just don't think they're persuasive.

Possibly, if there's to be a narrower interpretation of that statute barring these actions, maybe it's for the higher court to announce a new rule.

But, thank you, Mr. Smurr.

MR. SMURR: Thank you, your Honor.

THE COURT: Do either of defense counsel wish to address the motion, having in mind that nothing has swayed my intended judgment?

MR RUDOLPH: No, your Honor.

MR. MANSFIELD: No, your Honor.

THE COURT: First of all, some legal principles applicable; on this

12(b)(1) motion, plaintiffs have the burden of establishing this Court's jurisdiction and conclusionary allegations of jurisdiction are inadequate. That's the holding of the pettis against Morrison-Knudsen care cited by County defendants.

And, whereas here, the actual existence of subject matter jurisdiction is challenged, plaintiffs, must present some evidence to establish jurisdiction. That's the holding of the Trenta-Costa against Frontier pacific case cited by County defendant.

The False Claims Act, upon which this qui tam action is based, provides that no court has jurisdiction of such an action based upon public disclosures, unless the action is brought by a person who is an original source of the

information, upon which the action is based, and then only if the person first provided the information to the Government before filing the court action.

The amicus brief supplies the actual materials submitted to the U.S. As the Federal amicus points out, and defendants argue, they are all, or at least all appear to be, public documents.

Also, they were supplied to the Government after the information was public.

More important, even if the plaintiffs had direct and independent knowledge of the information upon which their allegations are based, they did not voluntarily provide that information to the Government before filing the

complaint based on that information; and, therefore, plaintiffs do not qualify as an original source within the meaning of Section 3720 subdivision (e)(4)(A) and (B) of Title 31.

This statute, barring qui tam action, was construed broadly in the Second Circuit Dick against Long Island Lighting case decide this past August and attached in slip opinion form to the amicus brief. Plaintiffs give no persuasive reason for a narrower interpretation.

To the extent that plaintiffs argue that juvenile court proceedings and administrative proceedings before the Department of Social Welfare Services are confidential and not public information, plaintiffs, do not explain how they got this allegedly confidential

information.

Moreover, one of the documents plaintiffs, submitted to the Government was a Superior Court civil complaint, document number three, and that obviously became a public record when filed some seven and a half months before it was submitted to the Government.

Also, in response to County defendants' interrogatories asking plaintiff to identify the bases for their false claim allegations, plaintiffs identify only public documents, including documents obtained form the State Department of Social Services through the Freedom of Information Act. The identified -- that is, plaintiffs identified no confidential documents in their response

to the interrogatories.

Plaintiffs also base their claim, apparently, on the Sacramento Union article which, of course is public information.

Thus plaintiffs have failed to meet their burden of submitting evidence to prove jurisdiction as required by the Ninth Circuit case of Trenta-Costa against Frontier Pacific.

It's for these reasons that defendants' motion to dismiss, all defendants' motion to dismiss, for lack of subject matter jurisdiction is granted. With that disposition, I don't reach the alternative grounds raised as a basis for the motion of judgment on the pleadings.

Mr. Rudolph, since you had the most extensive briefly, will you prepare a

summary order in favor of defendants and submit that within ten days?

MR RUDOLPH: yes, your Honor, I will.

THE COURT: All right, thank you, Counsel.

(Proceedings concluded.)

Certificate of Reporter

I, JAMES G. VINE, Official Court Reporter for the Eastern District of California, certify that the foregoing sixteen (16) pages constitute a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to a written transcript.

DATE: December 10, 1990

/s/

JAMES G. VINE, CSR
CSR License No. 1515

CONSTITUTIONAL PROVISIONS AND STATUTES AND REGULATIONS INVOLVED.

1. Vth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public dangers; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; criminal case to be a witness against himself, nor be deprived without due process of law, nor shall private property be taken for public use, without just compensation."

28 USC § 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

(June 25, 1948, ch 646, § 1, 62 Stat. 944.

§3729 False Claims

(a) Liability for certain acts. Any person who-

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the

Government;

(3) conspires to defraud the government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a

pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5000 and not more than $10,000 plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that-

(A) the person committing the violation of this subsection furnished officials of the United

States responsible for investigating false claims violations with all information known to such person about the violation with 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated; with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into

such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information-

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 or title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

(As amended Oct. 27, 1986, P.L. 99-562, § 2, 100 Stat. 3153)

§3730 Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons. (1) A person may bring a civil action for a violation of section 3729 for the person

and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and

the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall-

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it

declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions. (1) If the government proceeds with the action, it shall have the primary responsibility for prosecuting the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

(C) Upon a showing by the government that unrestricted

participation during the course of the litigation by the person initiating the action would-

interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as-

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copes of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the government's expense). When a person proceeds with the action, the court, without limiting the status and

rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the government proceeds with the action, upon a showing by the government that certain actions of discovery by the person initiating the action would interfere with the government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conduced in camera. The court may extend the 60-day period upon a further showing in camera that the government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed

discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. for purposes of the preceding sentence, a finding or

conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff. (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to

be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 person of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. any such person shall

also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. all such expenses, feed, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides in reasonable for collecting the civil penalty and damages. The amount shall not be less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys'

fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which tne person would otnerwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the

violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. (1) No

court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the government when the action was brought.

(B)For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in [section] paragraphs (1) through (8) of section 101(f) of the Ethics in

government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the

information.

(B) for purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) any employee who is discharged,

demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the

discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

42 USC 670. Congressional declaration of purpose; authorization of appropriations For the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would be eligible for assistance under the State's plan approved under part A [42 USC §§ 601 et seq.], and adoption assistance for children with special needs there are authorized to be appropriated for each fiscal year (commencing with the fiscal year which

begins October 1, 1980) such sums as may be necessary to carry out the provisions of this part [42 USC §§ 670 et seq.]. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under this part [42 USC §§ 670 et seq.].

USC § 671. State Plan for foster care and adoption assistance

(a) Requisite features of State plan. In order for a State to be eligible for payments under this part [42 USC §§ 670 et seq.], it shall have a plan approved by the Secretary which-

(1) provides for foster care maintenance payments in accordance with section 472 [42 USC § 673];

(2) provides that the State agency responsible for administering the program authorized by part B of this title [42 USC §§ 620 et seq.] shall administer, or supervise the administration of, the program authorized by this part [42 USC §§ 670 et seq.];

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part [42 USC §§ 670 et seq.] will be coordinated with the programs at the State or local level assisted underparts A and B of this title [42 USC §§ 601 et seq., 620 et seq.], under title XX of

this Act [42 USC §§ 1397 et seq.], and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration of its programs under this part [42 USC §§ 670 et seq.], use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2)

(hereinafter in this part [42 USC §§ 670 et seq.] referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part [42 USC §§ 670 et seq.];

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A)

the administration of the plan of the State approved under this part [42 USC §§ 670 et seq.], the plan or program of the State under part A, B, or D of this title [42 USC §§ 601 et seq., 620 et seq., 651 et seq.] (including activities under part F [42 USC §§ 681 et seq.]) or under title I,V, X, XIV, XVI [42 USC §§ 301 et seq., 701 et seq., 1201 et seq., 1351 et seq., 1381 et seq.] (as in effect in Puerto Rico, Guam and the Virgin Islands), XIX, or XX [42 USC §§ 1396 et seq.,1397 et seq.] or the supplemental security income program established by title XVI [42 USC §§ 1381 et seq.],

(B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or

program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity, and (E) reporting and providing information pursuant to paragraph (9) to appropriate authorities with respect to known or suspected child abuse or neglect; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to any

activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited that those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that the State agency will --

(A) report to an appropriate agency or official, known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child receiving aid under part B or this part [42 USC §§ 620 et seq. or 671 et seq.] under circumstances which

indicate that the child's health or welfare is threatened thereby; and

(B) provide such information with respect to a situation described in subparagraph (A) as the State agency may have;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so

established shall be applied by the State to any foster family home or child care institution receiving funds under this part [42 USC §§ 670 et seq.] or part B of this title [42 USC §§ 620 et seq.];

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part [42 USC §§ 670 et seq.] is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall

arrange for a periodic and independently conducted audit of the programs assisted ;under this part [42 USC §§ 670 et seq.] and part B of this title [42 USC §§ 620 et seq.], which shall be conducted no less frequently than once every three years;

(14) provides ((A)) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period

in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 475(1) [42 USC § 675(1)] for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 475(5)(B) [42 USC

§ 675(5)(B)] with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans approved under parts A and D [42 USC §§ 601 et seq., 651 et seq.], to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part [42 USC §§ 670 et seq.].

(b) Failure of State to comply with plan provisions. The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section. However, in any case in which the Secretary finds, after reasonable notice and opportunity for a hearing,

that a State plan which has been approved by the Secretary no longer complies with the provisions of subsection (a), or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part [42 USC §§ 670 et seq.], or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State, or shall reduce such payments by the amount specified in his notification to the State.

45 § 205.10 Hearings.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, or XVI (AABD) of the Social Security Act shall provide for a system of hearings under which:

(1) The single State agency responsible for the program shall be responsible for fulfillment of hearing provisions which shall provide for:

(i) A hearing before the State agency, or

(ii) an evidentiary hearing at the local level with a right or appeal to a State agency hearing. Where a State agency adopts a system of evidentiary hearings with an appeal to a State agency hearing, it may, in some political subdivisions, permit local evidentiary hearings, and in others,

provide for a single hearing before the State agency. Under this requirement hearings shall meet the due process standards set forth in the US. Supreme Court decision in Goldberg v. Kelly, 397 U.S. 254 (1970) and the standards set forth in this section.

(2) Hearing procedures shall be issued and publicized by the State agency. Such procedures shall provide for a face-to-face hearing or, at State option, a hearing by telephone when the applicant or recipient also agrees. Under this provision, the State shall assure that the applicant or recipient is afforded all rights as specified in this section, whether the hearing is face-to-face or by telephone;

(3) Every applicant or recipient shall be informed in writing at the time

of application and at the time of any action affecting his claim:

(i) Of his right to a hearing, as provided in paragraph (a)(5) of this section;

(ii) Of the method by which he may obtain a hearing;

(iii)That he may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman, or he may represent himself.

(4) In cases of intended action to discontinue, terminate, suspend or reduce assistance or to change the manner or form of payment to a protective, vendor, or two-party payment under § 234.60:

(i) The State or local agency shall give timely and adequate notice, except

as provided for in paragraphs (a)(4)(ii), (iii) or (iv) of this section. Under this requirement:

(A) "Timely" means that the notice is mailed at least f10 days before the date of action, that is, the date upon which the action would become effective;

(B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing (if provided) and a State agency hearing, the circumstances under which assistance is continued if a hearing is requested, and if the agency action is upheld, that such assistance must be repaid under title IV-A, and must also

be repaid under titles I, X, XIV or XVI (AABD) if the State plan provides for recovery of such payments.

(ii) The agency may dispense with timely notice but shall send adequate notice not later than the date of action when:

(A) The agency has factual information confirming the death of a recipient or of the AFDC payee when there is no relative available to serve as new payee:

(B) The agency receives a clear written statement signed by a recipient that he no longer wishes assistance, or that gives information which requires termination or reduction of assistance, and the recipient has indicated, in writing, that he understands that this must be the consequence of supplying

such information;

(C) The recipient has been admitted or committed to an institution, and further payments to that individual do not qualify for Federal financial participation under the State plan;

(D) The recipient has been placed in skilled nursing care, intermediate care or long-term hospitalization;

(E) The claimant's whereabouts are unknown and agency mail directed to him has been returned by the post office indicating no known forwarding address. The claimant's check must however, be made available to him if his whereabouts become known during the payment period covered by a returned check;

(F) A recipient has been accepted for assistance in a new jurisdiction and that fact has been established by the

jurisdiction previously providing assistance;

(G) An AFDC child is removed from the home as a result of a judicial determination, or voluntarily placed in foster care by his legal guardian;

(H) For AFDC, the agency takes action because of information the recipient furnished in a monthly report or because the recipient has failed to submit a complete or a timely monthly report without good cause. (See §233.37);

(I) a special allowance granted for a specific period is terminated and the recipient has been informed in writing at the time of initiation that the allowance shall automatically terminate at the end of the specified period;

(J) the agency has made a

presumption of mismanagement as a result of a recipient's nonpayment of rent and provides for post hearings in such circumstances;

(iii) When changes in either State or Federal Law require automatic grant adjustments for classes of recipients, timely notice of such grant adjustments shall be given which shall be "adequate" if it includes a statement of the intended action, the reasons for such intended action, a statement of the specific change in law requiring such action and a statement of the circumstances under which a hearing may be obtained and assistance continued.

(iv) When the agency obtains facts indicating that assistance should be discontinued, suspended, terminated, or reduced because of the probable fraud of

the recipient, and, where possible, such facts have been verified through collateral sources, notice of such grant adjustment shall be timely if mailed at least five (5) days before action would become effective.

(5) an opportunity for hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance (including a request for supplemental payments under §§ 233.23 and 233.27) is denied, or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance, or determination that a protective, vendor, or two-party payment should be made or

continued. A hearing need not be granted when either State or Federal law requires automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation.

(i) A request for a hearing is defined as a clear expression by the claimant (or his authorized representative acting for him), to the effect that he wants the opportunity to present his case to higher authority. the State may require that such request be in written form in order to be effective;

(ii) The freedom to make such a request shall not be limited or interfered with in any way. the agency may assist the claimant to submit and process his request;

(iii) The claimant shall be provided reasonable time, not to exceed 90 days, in which to appeal an agency action;

(iv) Agencies may respond to a series of individual requests for hearing by conducting a single group hearing agencies may consolidate only cases in which the sole issue involved is one of State or Federal law or policy or changes in State or Federal law. In all group hearing, the policies governing hearings must be followed. thus, each individual claimant shall be permitted to present his own case or be represented by his authorized representative;

(v) The agency may deny or dismiss a request for a hearing where it has been withdrawn by the claimant in

writing, where the sole issue is one of State or Federal law requiring automatic rant adjustments for class of recipients, where a decision has been rendered after a WIN hearing before the manpower agency that a participant has, without good cause, refused to accept employment or participate in the WIN program, or has failed to request such a hearing after notice of intended action for such refusal, or where it is abandoned. Abandonment may be deemed to have occurred if the claimant, without good cause therefore, fails to appear by himself or by authorized representative at the hearing scheduled for such claimant.

(6) If the recipient requests a hearing with the timely notice period:

(i) Assistance shall not be

suspended, reduced, discontinued or terminated (but is subject to recovery by the agency if its action is sustained), until a decision is rendered after a hearing, unless:

(A) A determination is made at the hearing that the sole issue is one of State or Federal law or policy, or change in State or Federal law and not one of incorrect grant computation;

(B) A change affecting the recipient's grant occurs while the hearing decision is pending and the recipient fails to request a hearing after notice of the change;

(C) The recipient specifically requests that he or she not receive continued assistance pending a hearing decision; or

(D) The agency has made a

presumption of mismanagement as a result of a recipient's nonpayment of rent and provides for the opportunity for a hearing after the manner or form of payment has been changed for such cases in accordance with § 234.60 (1)(20 § 234.60 (a)(2) and (a)(11).

(ii) The agency shall promptly inform the claimant in writing if assistance is to be discontinued pending the hearing decision; and

(iii) In any case where the decision of an evidentiary hearing is adverse to the claimant, he shall be informed of and afforded the right to make a written request, within 15 days of the mailing of the notification of such adverse decision, for a State agency hearing and of his right to request a de novo hearing.Unless a de

novo hearing is specifically requested by the appellant, the State agency hearing may consist of a review by the State agency hearing officer of the record of the evidentiary hearing to determine whether the decision of the evidentiary hearing officer was supported by substantial evidence in the record. Assistance shall not be continued after an adverse decision to the claimant at the evidentiary hearing.

(7) A State may provide that a hearing request made after the date of action (but during a period not in excess of 10 days following such date) shall result in reinstatement of assistance to be continued until the hearing decision, unless (i) the recipient specifically requests that continued assistance not be paid pending

the hearings decision; or (ii) at the hearing it is determined that the sole issue is one of State or Federal law or policy. In any case where action was taken without timely notice, if the recipient requests a hearing within 10 days of the mailing of the notice of the action, and the agency determines that the action resulted from other than the application of State or Federal law or policy or a change in State or Federal law, assistance shall be reinstated and continued until a decision is rendered after the hearing, unless the recipient specifically requests that continued assistance not be paid pending the hearing decision.

(8) The hearing shall be conducted at a reasonable time, date, and place, and adequate preliminary written notice

shall be given.

(9) Hearings shall be conducted by an impartial official (officials) or designee of the agency. Under this requirement, the hearing official (officials) or designee shall not have been directly involved in the initial determination of the action in question.

(10) When the hearing involves medical issues such as those concerning a diagnosis, an examining physician's report, or a medical review team's decision, a medical assessment other than that of the person or persons involved in making the original decision shall be obtained at agency expense and made part of the record if the hearing officer considers it necessary.

(11) In respect to Title IV-C, when the appeal has been taken on the basis

of a disputed WIN registration requirement, exemption determination or finding a failure to appear for an appraisal interview, a representative of the local WIN manpower agency shall, where appropriate, participate in the conduct of the hearing.

(12)The hearing shall include consideration of:

(i) An agency action, or failure to act with reasonable promptness, on a claim for financial assistance, which includes undue delay in reaching a decision on eligibility or in making a payment, refusal to consider a request for or undue delay in making an adjustment in payment, and discontinuance, termination or reduction of such assistance;

(ii) agency decision regarding:

(A) Eligibility for financial assistance in both initial and subsequent determinations,

(B) Amount of financial assistance or change in payments,

(C) The manner or form of payment, including restricted or protective payments, even though no Federal financial participation is claimed.

(13) The claimant, or his representative, shall have adequate opportunity:

(i) To examine the contents of his case file and all documents and records to be used by the agency at the hearing at a reasonable time before the date of the hearing as well as during he hearing;

(ii) At his option, to present his case himself or with the aid of an

authorized representative;

(iii) To being witnesses;

(iv) To establish all pertinent facts and circumstances;

(v) To advance any arguments without undue interference;

(vi) to question or refute any testimony or evidence, including opportunity to confront and cross-examine adverse witnesses.

(14) Recommendations or decisions of the hearing officer or panel shall be based exclusively on evidence and other material introduced at the hearing. the transcript or recording of testimony and exhibits, or an official report containing the substance of what transpired at the hearing, together with all papers and requests filed in the proceeding, and the recommendation or

decision of the hearing officer or panel shall constitute the exclusive record and shall be available to the claimant at a place accessible to him or his representative at a reasonable time.

(15) Decisions by the hearing authority shall:

(i) In the event of an evidentiary hearing, consist of a memorandum decision summarizing he facts and identifying the regulations supporting the decision;

(ii) In the event of a State agency de novo hearing, specify the reasons for the decision and identify the supporting evidence and regulations.

Under this requirement no persons who participated in the local decision being appealed shall participate in a final administrative decision on such a case.

(16) Prompt, definitive, and final administrative action shall be taken within 90 days from the date of the request for a hearing.

(17) the claimant shall be notified of the decision in writing and, to the extent it is available to him, of his right to appeal to State agency hearing or judicial review.

(18) When the hearing decision is favorable to the claimant, or when the agency decides in favor of the claimant prior to the hearing, the agency shall promptly make corrective payments retroactively to the date the incorrect action was taken.

(19) all state agency hearing decisions shall be accessible to the public (subject to provisions of safeguarding public assistance

information).

(b) Federal financial participation. Federal financial participation is available for the following items:

(1) Payments of assistance contained pending a hearing decision.

(2) Payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with application Federal policies on corrective payments.

(3) Payments of assistance within the scope of Federally aided public

assistance programs made in accordance with a court order.

(4) Administrative costs incurred by the agency for:

(i) Providing transportation for the claimant, his representative and witnesses to and from the place of the hearing;

(ii) Meeting other expenditures incurred by the claimant in connection with the hearing;

(iii) Carrying out the hearing procedures, including expenses of obtaining an additional medical assessment.

PART 1355 GENERAL

AUTHORITY: Adoption Assistance and Child Welfare Act of 1980 Pub. L. 96-272, 42 U.S.C. 670 et seq., 94 Stat. 501, 42 U.S.C. of the Social Security

Act, as amended, 42 U.S.C. 1302.

§ 1355.10 Scope.

Part 1355 applies to State programs and contains general requirements for Federal financial participation under titles IV-E and IV-B of the Social Security Act, as amended.

§ 1355.20 Definitions.

(a) Unless otherwise specified, the following terms as they appear in 45 CFR Parts 1355, 13 and 1357 of this title are defined as follows-

Act means the Social Security Act, as amended.

ACYF means Administration for Children, Youth and Families, Office of Human Development Services, U.S. Department of Health and Human Services.

Child abuse and neglect means the definition contained in 45 CFR Part

1340, Child Abuse and Neglect Prevention and Treatment Program.

Commissioner means the Commissioner for Children, Youth and Families (ACYF), Office of Human Development Services, U.S. Department of Health and Human Services.

Department means the United State Department of Health and Human Services.

Detention facility in the context of the definition of child care institution in section 472(c)(2) of the Act means a physically restricting facility for the care of children who require secure custody pending court adjudication, court disposition, execution of a court order or after commitment.

Foster family home means the home of an individual or family licensed or

approved by the State licensing or approval authority(ies) (or with respect to foster family homes on or near Indian reservations, by the tribal licensing or approval authority(ies)), that provides 24-hour out-of-home care for children. The term may include group homes, agency operated boarding homes or other facilities licensed or approved for the purpose of providing foster care by the State agency responsible for approval or licensing of such facilities.

State means the 50 States, the District of Columbia, and, except in 45 CFR 1356.65 and 1356.70, the Commonwealth of Puerto Rico, Guam, the Virgin Islands and the Commonwealth of the Northern Mariana Islands.

State Agency means the State agency administering or supervising the

administration of the title IV-E and title IV-B State plans.

(b) Unless otherwise specified, the definitions contained in section 475 of the Act apply to all programs under titles IV-E and IV-B of the Act.

PART 1356 REQUIREMENTS APPLICABLE TO TITLE IV-E

§1356.10 Scope

This part applies to State programs for foster care maintenance payments, adoption, assistance payments and related administrative and training expenditures under title IV-E of the Act.

§1356.20 State plan document and submission requirements.

(a) To be in compliance with the State plan requirements and to be eligible to receive Federal financial

participation (FFP) in the costs of foster care maintenance payments and adoption assistance under this part, a State must have a State plan approved by the Secretary that meets the requirements of this part. Part 1355 and section 471(a) of the Act. The title IV-E State plan must be submitted to the appropriate Regional Office. ACYF, in a form determined by the State.

(b) If a State chooses to claim FFP for voluntary foster care placements, the State must meet the requirements of paragraph (a) of this section and section 102 of Pub. L. 96-272, the Adoption Assistance and Child Welfare Act of 1980, as it amends section 472 of the Act.

(c) The following procedures for approval of State plans and amendments

apply to the title IV-E program:

(1) The State plan consists of written documents furnished by the State to cover its program under Part E od title IV. After approval of the original plan by the Commissioner, ACYF, all relevant changes, required by new statutes, rules, regulations, interpretations, and court decisions, are required to be submitted currently so that ACYF may determine whether the plan continues to meet Federal requirements and policies.

(2) *Submittal.* State plans and revisions of the plans are submitted first to the State Governor or his designee for review and then to the regional office, ACYF. The States are encouraged to obtain consultation of the regional staff when a plan is in process

of preparation or revision.

(3) *Review.* Staff in the regional offices are responsible for review of State plans and amendments. They also initiate discussion with the State agency on clarification of significant aspects of the plan which come to their attention in the course of this review. State plan material on which the regional staff has questions concerning the application of Federal policy is referred with recommendations as required to the central office for technical assistance. Comments and suggestions, including those of consultants in specified areas, may be prepared by the central office for use by the regional staff in negotiations with the State agency.

(4) *Action.* The Regional Office,

ACYF, exercises delegated authority to take affirmative action of State plans and amendments thereto on the basis of policy statements or precedents previously approved by the Commissioner, ACYF, retains authority for determining that proposed plan material is not approvable, or that a previously approved plan no longer meets the requirements for approval, except that a final determination of disapproval may not be made without prior consultation and discussion by the Commissioner, ACYF, with he Secretary. The Regional Office, ACYF, formally notifies the State agency of the actions taken on State plans or revisions.

(5) *Basis for approval.* Determinations as to whether State plans (including plan amendments and

administrative practice under the plans) originally meet or continue to meet, the requirements for approval are based on relevant Federal statutes and regulations.

(6) *Prompt approval of State plans.* The determination as to whether a State plan submitted for approval conforms to the requirements for approval under the Act and regulations issued pursuant thereto shall be made promptly and not later than the 45th day following the date on which the plan submittal is received in the Regional Office, ACYF, has secured from the State agency a written agreement to extend that period.

(7) *Prompt approval of plan amendments.* Any amendment of an approved State plan may, at the option

of the state, be considered as s submission of a new State plan. If the State requests that such amendment be so considered the determination as to its conformity with the requirements for approval shall be made promptly and later than the 45th day following the date on which such a request is received in the regional office with respect to an amendment that has been received in such office unless the Regional office, ACYF, has secured from the State agency a written agreement to extend that period. In absence of request by a State that an amendment of an approved State plan shall be considered as a submission of a new State plan, the procedures under §201.6 (a) and (b) shall be applicable.

(8) *Effective Date.* The effective

date of a new plan may not be earlier than the first day of the calendar quarter in which an approvable plan is submitted, and with respect to expenditures for assistance under such plan, may not be earlier than the first day on which the plan is in operation on a statewide basis. The same applies with respect to plan amendments.

(d) Once the title IV-E State plan has been submitted and approved, it shall remain in effect until amendments are required. An amendment is required if there is any significant and relevant change in the information or assurances in the plan, or the organization, policies or operations described in the plan.

§1356.40 Adoption assistance program: Administrative requirements to implement section 473 of the Act.

(a) To implement the adoption assistance program provision of the title IV-E State plan and to be eligible for Federal financial participation in adoption assistance payments under this part the state must meet the requirements of this section and sections 471(a), 473 and 475(3)of the Act.

(b) The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party; and

(2) Specify its durations; and

(3) Specify the nature and amount of any payment, services and assistance to be provided under such agreement and for purposes of eligibility under title XIX of the Act, specify that the child is eligible for Medicaid services; and

(4) Specify, with respect to agreements entered into on or after October 1, 1983, that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time.

(c) There must be no income eligibility requirement (means test) for the prospective adoptive parents(s) in determining eligibility for adoption assistance payments.

(d) In the event an adoptive family moves from one State to another State, the family may apply for social

services on behalf of the adoptive child in the new State of residence. However, for agreements entered into on or after october 1, 1983, if a needed service(s) specified in the adoption assistance agreement is not available in the new State of residence, the state making the original adoption assistance payment remains financially responsible for providing the specified service(s).

(e) A State may make an adoption assistance agreement with adopting parent(s) who reside in another State. If so, all provisions of this section apply.

(f) The State agency must actively seek ways to promote the adoption assistance program.

§ 1356.50 **Withholding of funds for noncompliance with the approved title IV-E State plan.**

(a) To be in compliance with the title IV-E State plan requirements, a State must meet the requirements of the Act and 45 CFR 1356.20, 1356.21 and 1356.40 of this part.

(b) To be in compliance with the title IV-E State plan requirements, a State that chooses to claim FFP for voluntary placements must meet the requirements of the Act, 45 CFR 1356.30 and paragraph 9a) of this section;and

(c) For purposes of this section, the provisions of 45 CFR Part 213, practice and Procedure for Hearings to States on Conformity of Public Assistance Plans to Federal Requirements, apply.

§ 1356.60 **Fiscal requirements (title IV-E).**

(a) *Federal matching funds for foster care maintenance and adoption*

assistance payments. (1) Effective October 1, 1980, Federal financial participation (FFP) is available to States under an approved title IV-E State plan for allowable costs in expenditures for:

(i) foster Care maintenance payments as defined in section 474(4) of the Act, made in accordance with 45 CFR 1356.20 through 1356.30 of this part, section 472 of the Act and section 102(d) of Pub. L. 96-272, the Adoption Assistance and Child Welfare Act of 1980;

(ii) Adoption assistance payments made in accordance with 45 CFR 1356.20 and 1356.40 and sections 473 and 465(3) of the Act.

(2) federal financial participation is available at the rate

of Federal medical assistance percentage as defined in section 1905(b) of the Act, Definitions, and pertinent regulations as promulgated by the Secretary, or his designee.

(b) *Federal matching funds for State and local training for foster care and adoption assistance under title IV-E.* (1) Federal financial participation is available at the rate of seventy-five percent (75%) in the costs of training personnel employed or preparing for employment by the state or local agency administering the plan.

(2) All training activities and costs funded under title IV-E shall be included int he State agency's training plan for title IV-B.

(3) short and long term training at education institutions and in-service

training may be provided in accordance with the provisions of §§ 235.63 through 235.66(a) of this title.

(c) *Federal matching funds for other State and local administrative expenditures for foster care and adoption assistance under title IV-E.* Federal financial participation is available at the rate of fifty percent (50%) for administrative expenditures necessary for the proper and efficient administration of the title IV-E State plan. The State;s cost allocation plan shall identify which costs are allocated and claimed under this program.

(1) The determination and redetermination of eligibility, fair hearings and appeals, rate setting and other costs directly related only to the administration of the foster care

program under this part are deemed allowable administrative costs under this paragraph. They may not be claimed under any other section or Federal program.

(2) The following are examples of allowable administrative costs necessary for the administration of the foster care program:

(i) Referral to services;

(ii) Preparation for and participation in judicial determinations;

(iii) Placement of the child;

(iv) Development of the case plan;

(v) Case reviews;

(vi) Case management and supervision;

(vii) Recruitment and licensing of foster homes and institutions;

(viii) Rate setting; and

(ix) A proportionate share of related agency overhead.

(3) Allowable administrative costs do not include the costs of social services provided to the child, the child's family or foster family which provide counseling or treatment to ameliorate or remedy personal problems, behaviors or home conditions.

(4) Foster and adoptive parents, and staff of licensed or approved child care institutions providing foster care under this part shall be eligible for short-term training at the initiation of or during their provision of care. FFP directly related to such training shall be limited to travel and per diem.

Federal Rules of Civil Procedure

Rule 9. Pleading Special Matters

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 12. Defenses and Objections-When and How Presented-By Pleading or Motions-Motion for Judgment on Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over

the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties

shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FRCP RULE 12. (b)(1), (6); 12 (c)

Rule 12(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleadings whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the

following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter,

(6) failure to state a claim upon which relief can be granted

Rule 12(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 6.

Rule 15. Amended and Supplemental Pleadings

(a) **Amendments.** A party may amend the party's

pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the

pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law

that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against

the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted oven though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party

plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time

fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. a summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what

material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or

opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or

may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons

for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for new trial shall be served not later than 10 days after the entry of the judgment.

(c) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either

case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

FEDERAL RULES OF EVIDENCE

Rule 302. Applicability of State Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State Law supplies the rule of decision is determined in accordance with State Law.

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of

a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Civil Code of State of California

CC 1798.1 [Legislative declaration and findings]

The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article

I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them. the Legislature further makes the following findings:

(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.

(b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.

(c) In order to protect the privacy of individuals, it is necessary that the

maintenance and dissemination of personal information be subject to strict limits.

Government code of State of California

§ 6250. Legislative finding and declaration

In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and decares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

§ 6252. Definition of terms

As used in this chapter:

(a) "State agency" means every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those

agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.

(b) "Person includes a county; citywhether general law or chatered; city and county; scholl district; municipa; corporation; district; political subdivision; or any board, commission or agency thereof; * * * other local public agency; *or nonprofit organizations of local government agencies and officials which are supported solely by public funds.*

(c) "Person" includes any natural person, corporation, partnership, firm, or association.

(d) "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used or retained by any

state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.

(e) "Writing means handwriting, typewriting, printing photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination therof, and all papers, maps magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

(f) "Member of the public" means any person, except a member, agent officer, or employee of a federal, state, or

local agency acting within the scope of his or her membership, agency, office, or employment. Amended stats 1991 ch 181 § 1 (AB 788)

Amendments:

1991 Amendment: Amended subd (b) by (1) deleting "or" after "agency thereof,", and (2) adding ", or nonprofit organizations of local governmental agencies and officials which are supported solely by public funds".

Welfare and Institutions Code

§ 827. Limitation of right to inspect petition and report; Authorized inspection

(a) Except as provided in Section 828, a petition filed in any juvenile court proceeding, reports of the probation officer, and all other documents filed

in any such case or made available to the probation officer in making his or her report, or to the judge, referee or other hearing officer, and thereafter retained by the probation officer, judge, referee, or other hearing officer, may be inspected only by court personnel, the district attorney, the minor who is the subject of the proceeding, his or her parents or guardian, the attorneys for the parties, and such other persons as may be designated by court order of judge of the juvenile court upon filing a petition therefor. child protective agencies, as defined in Section 11165.9 of the Penal code, also shall be entitled to inspect these documents upon the filing of a declaration under penalty of perjury stating that access

to these documents is necessary and relevant in connection with and in the course of a criminal investigation or a proceeding brought to declare a person a dependent child or ward of the juvenile court. Any records or reports relating to a matter within the jurisdiction of the juvenile court prepared by or released by the court, a probation department, or the county department of social services, any portion of those records or reports, and information relating to the contents of those records or reports shall not be disseminated by the receiving agencies to any persons or agencies other than those persons or agencies authorized to receive documents pursuant to this section. further, any of those records or reports, any portion of those records

or reports, and information relating to the contents of those records or reports, shall not be made attachments to any other documents without the prior approval of the presiding judge of the juvenile court, unless they are used in connection with and in the course of a criminal investigation or proceeding brought to declare a person a dependent child or ward of the juvenile court.

(b)(1) While the Legislature reaffirms its belief that juvenile court records, in general, should be confidential, it is the intent of the Legislature in enacting this subdivision to provide for a limited exception to juvenile court record confidentiality in cases involving serious acts of violence. Further, it is the intent of the Legislature that even in these selected

cases dissemination of juvenile court records be as limited as possible, consistent with the need to work with a pupil in an appropriate fashion and the need to protect potentially vulnerable school staff and other pupils over whom school staff exercise direct supervision and responsibility.

(2) Notwithstanding subdivision (a), written notice that a minor enrolled in a public school in kindergarten or grades 1 to 12 inclusive, has been found by a court of competent jurisdiction to have used, sold, or possessed narcotics or a controlled substance or to have committed any crime listed in paragraphs (1) to (15), inclusive, or (17) to (19), inclusive, of subdivision (b) of Section 707 shall be provided by the court, within seven days, to the superintendent

of the school district of attendance, which information shall be expeditiously transmitted to any teacher, counselor, or administrator with direct supervisorial or disciplinary responsibility over the minor who the superintendent or his or her designee, after consultation with the principal at the school of attendance, believes needs this information to work with the pupil in an appropriate fashion, to avoid being needlessly vulnerable or to protect other persons from needless vulnerability. Any information received by a teacher, counselor, or administrator under this subdivision shall be received in confidence for the limited purpose for which it was provided and shall not be further disseminated by the teacher, counselor,

or administrator. An intentional violation of the confidentiality provisions of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).

(3) If a minor is removed from public school as a result of the court's finding described in subdivision (b) the superintendent shall maintain the information in a confidential file and shall defer transmittal of the information received from the court until the minor is returned to public school. If the minor is returned to a school district other than the one from which the minor came, the parole or probation officer having jurisdiction over the minor shall so notify the superintendent of the last district of attendance who shall transmit the notice

received from the court to the superintendent of the new district of attendance.

(c) Each probation report filed with the court concerning a minor whose record is subject to dissemination pursuant to subdivision (b) shall include on the face sheet the school at which the minor is currently enrolled. The county superintendent shall provide the court with a listing of all of the schools within each school district, within the county, along with the name and mailing address of each district superintendent.

(d) Each notice sent by the court pursuant to subdivision (b) shall be stamped with the instruction: "Destroy This Record 12 Months After The Minor Returns To Public School. Unlawful Dissemination of This Information Is A

Misdemeanor." No information transmitted by the superintendent pursuant to subdivision (b) shall be transmitted by the superintendent or by any teacher, counselor, or administrator to any other person more than 12 months after receipt of the original notice from the court or more than 12 months after the minor returns to public school, whichever occurs last. any information received from the court shall be destroyed by school authorities 12 months after its receipt from the court or 12 months after the minor returns to public school, whichever occurs last. At any time after the date by which a record required to be destroyed by this section should have been destroyed the minor or his or her parent or guardian shall have the right to make a written request to

the principal of the school that the minor's school records be reviewed to ensure that the record has been destroyed. Upon completion of any requested review and no later than 30 days after the request for the review was received, the principal or his or her designee shall respond in writing to the written request and wither shall confirm that the record has been destroyed or, if the record has not been destroyed, shall explain why destruction has not yet occurred and shall specify the date by which the record will be destroyed.

(e) Except as provided in paragraph (2) of subdivision ((b) no liability shall attach to any person who transmits or fails to transmit any notice or information required under subdivision

(b).

§ 10850. Confidentiality of records; Exceptions; Violation as misdemeanor

(a) Except as otherwise provided in this section, all applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public social services for which grants-in-aid are received by this state from the United States government shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of such program, or any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of

any such program. The disclosure of any information which identifies by name or address any applicant for or recipient of such grants-in-aid to any committee or legislative body is prohibited, except as provided in subdivision (b)(b) Except as otherwise provided in this section, no person shall publish or disclose or permit or cause to be published or disclosed any list of persons receiving public social services. Any county welfare department in this state may release lists of applicants for, or recipients of, public social services, to any other county welfare department or the State Department of Social Services, and such lists or any other records shall be released when requested by any county welfare department or the State

Department of Social Services. Such lists or other records shall only be used for purposes directly connected with the administration of public social services. Except for such purposes, no person shall publish, disclose, or use or permit or cause to be published, disclosed, or used any confidential information pertaining to an applicant or recipient.

Any county welfare department and the State Department of Social Services shall provide any governmental entity which is authorized by law to conduct an audit oar similar activity in connection with the administration of public social services, including any committee or legislative body so authorized, with access to any public social service applications and records described in

subdivision (a) to the extent of such authorization. Such committees, legislative bodies and other entities may only request or use such records for the purpose of investigating the administration of public social services and shall not disclose the identity of any applicant or recipient except in the case of a criminal or civil proceeding conducted in connection with the administration of public social services.

However, this section shall not prohibit the furnishing of such information to other public agencies to the extent required for verifying eligibility or for other purposes directly connected with the administration of public social services, or to county superintendents of schools or superintendents of school

districts only as necessary for the administration of federally assisted programs providing assistance in cash or in-kind or services directly to individuals on the basis of need. any person knowingly and intentionally violating the provisions of this subdivision is guilty of a misdemeanor.
(c) The State Department of Social Services shall inform the Department of Motor Vehicles of the names, birth dates, and addresses of all applicants or recipients of aid to the blind. The Department of Motor Vehicles, upon receipt of such information, shall inform the State Department of Social Services of any such applicant or recipient of aid to the blind who holds a valid California driver's license.
(d)The State Department of Social

Services may make rules and regulations governing the custody, use and preservation of all records papers, files and communications pertaining to the administration of the laws relating to public social services under their jurisdiction. The rules and regulations shall be binding on all departments, officials and employees of the state, or of any political subdivision of the state and may provide for giving information to or exchanging information with agencies, public or political subdivisions of the state, and may provide for giving information to or exchanging information with agencies public or private, which are engaged in planning, providing or securing social services for or in behalf of recipients or applicants; and for making case

records available for research purposes, provided, that such research will not result in the disclosure of the identity of applicants for or recipients of public social services.

(e) Any person, including every public officer and employee, who knowingly secures or possesses, other than in the course of official duty, an official list or a list compiled from official sources, published or disclosed in violation of this section, of persons who have applied for or who have been granted any form of public social services for which state or federal funds are made available to the counties is guilty of a misdemeanor.

(f)This section shall not be construed to prohibit an employee of a county welfare department from disclosing

confidential information concerning a public social services applicant or recipient to a state or local law enforcement agency investigating or gathering information regarding a criminal act committed in a welfare department office or against any county or state welfare worker while involved in the administration of public social services. Such criminal acts shall include only those which are in violation of state or local law. Disclosure of confidential information pursuant to this subdivision shall be limited to the applicant's or recipient's name, physical description, and address.

(g) The provisions of this section shall be operative only to the extent permitted by federal law and shall not

apply to, but exclude, Chapter 7 (commencing with Section 14000) of this division, entitled "Basic Health Care", and for which a grant-in-aid is received by the state under Title XIX of the Social Security Act.

§ 10964. Digest of decisions

The department shall compile and distribute to each county department a current digest of decisions, properly indexed, rendered under this chapter, and each such digest shall be open to public inspection, subject, however, to the confidentiality requirements set forth in federal and state laws and regulations.

CERTIFICATE OF SERVICE

I, Diane Aslanian hereby declare that on ~~14~~ 15 September 1992, I served copies of the foregoing APPENDIX TO PETITION FOR WRIT OF CERTIORARI on the following:

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by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 15 September 1992 at Sacramento, California.

Dianne Aslanian

No. 92-512

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, *ex rel.*, KEVIN M. ASLANIAN; RICHARD L'ITALIEN; GEORGIA UREMOVIC; and CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS;
Petitioners,

v.

PETE WILSON, Governor, State of California; LONNIE CARLSON, Director, California State Department of Social Services; STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES; SACRAMENTO COUNTY, BOARD OF SUPERVISORS; PENELOPE CLARKE, Director, Sacramento County Department of Social Services; SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In an action under the False Claims Act brought by private persons, does the court lack subject matter jurisdiction where the action is based on court records, transcripts of court proceedings and a newspaper article?

2. In an action under the False Claims Act brought by private persons, are these persons "original sources" under 31 U.S.C. section 3730(e)(4)(B) where they did *not* provide information upon which the action is based to the Federal Government before filing the action?

3. Did the district court abuse its discretion (1) by not allowing petitioners' to amend their complaint, or (2) by denying petitioners' motion for reconsideration?

LIST OF PARTIES

Respondents George Deukmejian, Linda McMahon, and Dennis Hart no longer hold their public offices. Their successors in office, Pete Wilson, Lonnie Carlson, and Penelope Clarke, respectively, are automatically substituted pursuant to Federal Rules of Civil Procedure, Rule 25(d).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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Petitioners,

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PETE WILSON, Governor, State of California; LONNIE CARLSON, Director, California State Department of Social Services; STATE OF CALIFORNIA, DEPARTMENT OF SOCIAL SERVICES; SACRAMENTO COUNTY, BOARD OF SUPERVISORS; PENELOPE CLARKE, Director, Sacramento County Department of Social Services; SACRAMENTO COUNTY DEPARTMENT OF SOCIAL SERVICES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATUTE INVOLVED

The only relevant statute is 31 United States Code, section 3730, which is set forth in Petitioners' Appendix at pages 95 to 113. The pertinent subsection of that statute is set forth below.

31 U.S.C. section 3730(e)(4):

> "(A) No court shall have jurisdiction over an action under this section based upon the public disclosure

> of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

STATEMENT OF THE CASE

This is an action brought pursuant to the False Claims Act (31 U.S.C. sections 3729-32) by a coalition of welfare rights organizations and others to recover damages and civil penalties on behalf of the United States. Petitioners allege that State of California and Sacramento County officials falsely submitted claims to the federal government to collect payments for the administration of certain federal child welfare services programs. The District Court for the Eastern District of California dismissed the action for lack of subject matter jurisdiction and the Ninth Circuit Court of Appeals affirmed.

The evidence in the record at both the district court and appellate levels established that this action is based upon publicly disclosed allegations found in court documents and administrative hearing decisions. The action was dismissed under the jurisdictional bar of 31 U.S.C. section 3730(e)(4)(A). Petitioners did not qualify under the "original source" exception, because they did not satisfy the second element of this exception: no information was provided to the federal government before filing the action.

Petitioners contend that this action is not based on publicly disclosed allegations; that they have direct and independent knowledge of the information on which the allegations are based; and, that such information was transmitted to the federal government before filing the action. No evidence was submitted by petitioners to support these contentions.

REASONS FOR DENYING WRIT

I. THERE IS NO CONFLICT BETWEEN DECISIONS OF COURTS OF APPEALS CONCERNING THE JURISDICTIONAL BAR OF 31 U.S.C. SECTION 3730(e)(4)(A) WHERE THE ACTION IS BASED ON COURT RECORDS, TRANSCRIPTS OF COURT PROCEEDINGS AND A NEWSPAPER ARTICLE.

Actions under the False Claims Act are required to initially be filed under seal and served on the United States with "substantially all material evidence" possessed by the *qui tam* plaintiffs. (31 U.S.C. section 3730(b)(2).) The United States submitted an *amicus curiae* brief to the district court addressing the motion to dismiss, and therein attached copies of the documents provided to the United States with the complaint. (CR 85)[1]. The only documents included were administrative hearing decisions; documents from the Sacramento County Superior Court, including a complaint and a transcript of a proceeding; and, two opening briefs from the files of the California Court of Appeals, Third Appellate District.

Discovery conducted by respondents also indicated that petitioners' action is based upon a newspaper article published in the *Sacramento Union*, and unidentified documents obtained from the California Department of Social

[1] In this brief, the letters CR will be used to designate references to the "Certificate of Record" prepared at the time of appeal from the district court to the court of appeals. These references are being provided to aid this Court in requesting documents from the courts below, or from the parties, should the need arise.

Services through the Freedom of Information Act. (CR 75).

The district court concluded that all of these documents were publicly disclosed prior to the filing of the action. (Appendix to Petition, pages 80-85). The court of appeals agreed, making special note of the state Superior Court civil complaint and the newspaper article. (Appendix to Petition, pages 4-5).

Petitioners are correct in stating that there is some disagreement between the circuits as to whether the jurisdictional bar covers all documents within the public domain or only those in the enumerated categories. The first and eleventh circuits have adopted a narrow interpretation, finding that the list of methods of public disclosure in section 3730(e)(4)(A) is specific. *U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991), *U.S. ex rel. LeBlanc v. Raytheon Company*, 913 F.2d 17, 20 (1st Cir. 1990). The second and third circuits are supportive of a broader reading of the statute. *U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 15-16 (2d Cir. 1990), *U.S. ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1155-1160 (3rd Cir. 1991).

The petitioners are wrong, however, in indicating that this interpretative issue has any relevancy to this case. (Petition at page 13). Even under the most stringent interpretation of 31 U.S.C. section 3730(e)(4)(A), the district court lacked subject matter jurisdiction over this case. The documents identified above fall squarely within the categories enumerated in 31 U.S.C. section 3730(e)(4)(A), which include allegations publicly disclosed in "civil hearings", "administrative hearings" and from "the news media".

II. THE DECISION TURNS PREDOMINANTLY UPON AN ANALYSIS OF THE FACTS INVOLVED, AND THE FINDINGS OF FACT OF THE DISTRICT COURT RECEIVED THE CONCURRENCE OF THE COURT OF APPEALS.

Petitioners argue that the complaint was not based upon the documents identified above, but upon "independent research and investigation". (Petition, page 11.) This argument was made to both courts below. The district court held that the petitioners had failed to rebut the showing that the action was based upon the public documents submitted to the United States, and the court of appeals affirmed this holding. (Appendix to Petition, pages 4-5, 85).

Petitioners contend that, assuming a reliance on public records, they should escape dismissal of their action because they provided the information to the United States before filing the complaint. The United States says no information was received prior to the filing of the complaint. (CR 85). Both the district court and the court of appeals found that petitioners were required to come forward with evidence outside the pleadings, and they failed to offer any evidence that they met this jurisdictional requirement. (Appendix to Petition, pages 5-6, 82-83).

This Court has stated that "we do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). The Court has also frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 623, 73 L.Ed.2d 1012, 1021, 102 S.Ct. 3272 (1982).

In this case, both the district court and the court of appeals determined that petitioners were required to present evidence to support their jurisdictional allegations, relying upon *Trentacosta v. Frontier Pacific Aircraft Industries*, 813 F.2d 1553 (9th Cir. 1987) for their holdings. The *Trentacosta* court stated that:

> "If [a motion to dismiss for lack of subject matter jurisdiction] simply challenges the sufficiency of the allegations of subject matter jurisdiction, then the pleadings contents are taken as true for the purposes of the motion. However, if it challenges the actual existence of subject matter jurisdiction, then the pleadings allegations are merely evidence on the issue. Since the party invoking the Federal court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction, regardless of the pleadings allegations, the courts have held that *the pleader must establish jurisdiction with evidence* from other sources, such as affidavits or depositions." *Trentacosta v. Frontier Pacific Aircraft Industries, supra*, at page 1558-1559 citing 5 C. Wright and A. Miller, *Federal Practice and Procedure*, section 1363, at page 653-654 (1969). (Emphasis added).

It is noted that Petitioners have not challenged this legal standard, nor have they asserted that the standard was misapplied. Both courts below determined that petitioners had failed to offer any evidence in support of jurisdiction. (Appendix to Petition, pages 6-7, 85). This evidentiary determination of the two courts below should not be disturbed.

III. THE COURT OF APPEALS DID NOT FIND THAT PETITIONERS ARE "ORIGINAL SOURCES".

At three separate places in their petition, petitioners grossly misstated a ruling of the court of appeals. They contend that:

> "The Ninth Circuit altered the District Court's ruling and determined that Plaintiffs 'were original sources'." (Petition, page 18). (See also pages 10 and 22 of Petition).

To the contrary, the Ninth Circuit found exactly the opposite:

> "Even if the information relied upon by plaintiffs was publicly disclosed, the action is not barred if

> plaintiffs are the original source of the information. 31 U.S.C. section 3730(e)(4)(A). To qualify as an original source, a person must first have 'direct and independent knowledge of the information on which the allegations are based.' 31 U.S.C. section 3730 (e)(4)(B). There is no apparent dispute here that plaintiffs possessed such direct and independent knowledge. *Plaintiffs failed, however, to come forward with evidence that satisfied the second element of section 3730(e)(4)(B)—that they voluntarily provided information to the federal government before filing their action.*" (Appendix to Petition, pages 5-6). (Emphasis added).

The above statement establishes that petitioners are clearly in error in claiming that the court of appeals found them to be original sources. Petitioners' blatant mischaracterization tarnishes their credibility before this Court, and should be sufficient justification for denial of their petition.

IV. PETITIONERS ARE ATTEMPTING TO EXPAND THE SCOPE OF THE FALSE CLAIMS ACT.

The False Claims Act has been described as the Federal Government's primary tool for combatting fraud, and was originally enacted because of widespread fraud and corruption practiced in obtaining pay from the federal government during the Civil War. *Congressional Globe*, 37th Congress, Third Session, March 1863, page 952. It was never designed to reach every kind of fraud and was not designed to punish mistakes, incorrect claims, or negligence. *United States Code Congressional, and Administrative News*, 99th Congress-2nd Session, December 1986, Legislative History, Public Law 99-562, at page 5272; *United States v. McNigh*, 356 U.S. 595, 599, 2 L.Ed.2d 101, 78 S.Ct. 950 (1958).

The False Claims Act has recently been applied to a variety of circumstances. (*United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983), endorsement of a govern-

ment check known to be issued by mistake; *United States v. Olsoacy*, 836 F.2d 439, 440 (9th Cir. 1987), submission of a form claiming nonreceipt of a social security check to the Treasury Department when in fact the check was received; *United States v. Jackson*, 845 F.2d 876, 881 (9th Cir. 1988), submission of a form to the Veterans Administration alleging nonreceipt of eductional benefits, when in fact the checks had been received, endorsed, cashed or deposited).

Respondents are unaware of any actions brought against states under the False Claims Act, and there is only one reported case involving a local government entity. (*See, United States v. Board of Education of City of Union City*, 697 F. Supp. 167 (D.N.J. 1988)). By this action, petitioners are seeking to use the False Claims Act to challenge state and county administration of certain federal child welfare services programs. The Congressional purpose, the historical development, and the judicial interpretation of the False Claims Act do not support its expansion into the administration of governmental services.

V. THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION BY NOT ALLOWING PETITIONERS TO AMEND THE COMPLAINT, AND BY DENYING PETITIONERS' MOTION FOR RECONSIDERATION.

While it is true regarding requests to amend that leave shall be freely given when justice so requires (*Foman v. Davis*, 371 U.S. 178, 182, 9 L.Ed.2d 222, 226, 83 S.Ct. 227, 230 (1962)), the propriety of a motion for leave to amend is determined by reference to "undue delay, bad faith, futility of amendment, and prejudice to opposing party . . ." (*U.S. v. Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502 (9th Cir. 1991).) The key factors in the decision of the district court were that the "proffered amendments were futile and prejudicial to the respondents." (Appendix to Petition, page 8.)

The burden to demonstrate that proper subject matter jurisdiction existed rested with the petitioners. (Appendix to Petition, pages 42-43; CR 123, page 15, lines 7-11.) The petitioners failed to provide any evidence. (Appendix to Petition, pages 5-6). This deficiency cannot be cured by merely amending the pleadings. As the district court stated:

> "The changes that they request to make by amendment do not cure the jurisdictional defects . . ." (Appendix to Petition, page 57; CR 123, page 23, lines 9-11.)

The petitioners thereafter moved for reconsideration of the district court's order dismissing this action, and for the first time, petitioners submitted affidavits allegedly establishing proper subject matter jurisdiction. (Petition, page 16.) During the hearing on reconsideration, the district court stated:

> ". . . petitioners have not shown that the evidence submitted, declarations with attached letters from 1987 and 1988, were not within petitioners' possession at the time of the last hearing in November 1990. Therefore, under both the Frederick S. Wyle case and Local rule 230(k), they have not shown entitlement to reconsideration on the basis of newly discovered evidence." (Appendix to Petition page 49; CR 123, page 18, lines 23-25, page 19, line 1.)

In reviewing the district court's refusal to allow petitioners to file an amended complaint, the court of appeals found that the district court had properly exercised its discretion:

> "We also find no abuse of discretion in the court's refusal to allow plaintiffs to file an amended complaint. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (applying abuse of discretion standard). The court reasoned that the proffered amendments were futile and prejudicial to the defendants. Both grounds are sufficient to justify rejection of an amended complaint. *See id.* at 1387.

> Moreover, a third factor is relevant here. 'Where a party seeking amendment knows or should know of the facts upon which the proposed amendment is based, but fails to include them in the original complaint, the motion to amend may be denied.' *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir.), *vacated and remanded on other grounds*, 459 U.S. 810 (1982)."

And in reviewing the district court's denial of petitioners' motion for reconsideration, the court of appeals found that the district court did not abuse its discretion in denying reconsideration, as "Plaintiffs failed, however, to offer adequate grounds to explain why they did not present their evidence before dismissal." (Appendix to Petition, pages 7-8).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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